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## SYMPOSIUM

### INTRODUCTION: THE ABILITY OF THE CURRENT LEGAL FRAMEWORK TO ADDRESS ADVANCES IN TECHNOLOGY

LAWRENCE P. WILKINS\*

#### INTRODUCTION

An inquiry into the ability of the current legal framework to address advances in technology quickly encounters two different contexts in which the question arises: The first, on a general plane, is the adoption and use of technology in non-legal endeavors which enable new human capabilities which in turn give rise to legal problems. The second, on a more specific plane, is the adoption and use of technology by lawyers, judges, and others working in and with the law, which allow new capabilities for users and which may or may not lead to problems.

In the former context, the concern is whether and to what extent the legal system, including legal education, can deal with issues that are presented by advances in such fields as genetic engineering and medical technology, or electronic transmission of private and commercial information over global networks. The papers to be presented in this symposium will deal with these issues at length. In the latter context, the concerns are about how legal work can be done using state-of-the art technology and whether adjustments must be made in the legal system to accommodate the changes that technology enables. The main focus of these introductory remarks will be upon the ability of the current legal framework to address advances in technology in this latter context. In Part II, the remarks will briefly examine the history of development of technology pertinent to information systems. Part III will consider the rate of change and make some observations of the extent of adoption of information technology by those who do legal work. Part IV examines some factors pertaining to why the adoption of technology is a matter of some hesitancy in some quarters. Part IV

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\* Professor of Law and Director, Program for Management of Legal Information Systems, Indiana University School of Law—Indianapolis. Director of the Symposium. The author dedicates this Article to Minde Glenn Browning, Assistant Director, Program for Management of Legal Information Systems and Assistant Director of Readers Services, Indiana University School of Law—Indianapolis Law Library, who was an inspiring, creative colleague and dear friend whose passing created a void in the realm of law and technology that will never be filled. The author thanks Kristyn Kimery, Symposium Editor of the *Indiana Law Review* for proposing the idea for the Symposium and all of her many hours of dedicated effort in making it become a reality. The author also thanks Bruce Kleinschmidt and Chris Long of the Indiana University School of Law—Indianapolis Law Library for assistance in researching this Article.

presents some introductory thoughts along the general plane of the inquiry, hoping to set the stage for the presentations and responses comprising this Symposium. Finally, Part VI offers some conclusions about the general ability of the legal system to address technological change.

### I. INFORMATION TECHNOLOGY IN HISTORICAL CONTEXT

References in this section to technology adopted in the legal community pertain to information systems: combinations of hardware and software that enable people doing legal work to generate, analyze, augment, manipulate, store, retrieve, transmit and receive information in the performance of their various tasks. Such technology involves the use of devices and processes that allow the extension and transformation of human thinking into any form that can be shared with anyone who has access to the same technology. The term is used here in contrast to such other systems as those for transportation, security and entertainment, even though it may have some elements in common with these other systems.

This assessment of the ability of the current legal framework to address advances in technology will examine what has been done up to now, bring into high relief some of the changes that have occurred and then try to project those changes into the future. To do that will require some reference to technological advances outside the realm of legal endeavors.

To borrow an idea from Richard Susskind, who has written an excellent examination of the impact of information technology on legal work, we can obtain a sense of the influence technology has had by simply reflecting upon relatively recent developments and projecting our present circumstance backward.<sup>1</sup> Incidentally, we can also obtain a sense of the difficulty of assessing the ability of the legal system to deal with future developments. If we had conducted this Symposium in 1979, we would be prognosticating the use of personal computers in law offices. Those devices did not arrive on the market until 1981. Could we have foreseen then how widespread and important their use would become in the profession?

If we were to have conducted the Symposium in 1989, we could have predicted that the World Wide Web might have some possible application in the legal field; but, it was not developed until 1990, and who could have foreseen the dimensions that it was so quick to assume?

Today, employing powerful personal computers, network servers, and Internet technology, lawyers and law firms around the world maintain websites and home pages on the Web. Local, state, and federal governments and their agencies have official websites. Vast libraries of information are forming on the Web, and electronic commerce using Web technology continues to grow at a rapid pace. Taking advantage of the strengths of the Web in its capabilities for easily storing, searching, and transmitting data to users, Web-based providers of

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1. See RICHARD E. SUSSKIND, THE FUTURE OF LAW: FACING THE CHALLENGES OF INFORMATION TECHNOLOGY (1996).

data have created vast and expanding sets of resources for legal researchers' accession through Web browsers. These developments have occurred just in this current decade, and most of it during the past five years.

Deepening our perspective along the time dimension and considering the pace of technological development in a much earlier age increases our appreciation of the pace of change that confronts us today. One hundred and twenty-five years ago, E. Remington & Sons, the gun manufacturer, looking to open new markets after its boom years manufacturing weaponry for the war effort, introduced the first typewriter. The device had actually been patented one hundred and sixty years earlier, but had been considered only experimental technology until Remington put it into commercial use.<sup>2</sup>

Samuel Clemens purchased a typewriter that first year and became the first author to submit a typed manuscript to a publisher.<sup>3</sup> He soon developed a love-hate relationship with the machine that resembles the relationship that some of us have developed with modern technology. Part of his first message stated: "I am trying to get the hang of this new-fangled writing machine, but am not making a shining success of it. However, this is the first attempt I ever have made, & yet I perceive that I shall soon and easily acquire a fine facility in its use."<sup>4</sup> Twain later said the thing was ruining his morals because it made him want to swear.<sup>5</sup>

During the 1893 World's Fair in Chicago, Elisha Gray introduced a machine that he called the "teleautograph." The function of this invention was to automatically print out on a typing machine at one end of a wire the matter that had been written on another typing machine at the other end of the wire. The device was later developed commercially by a number of people as the teletypewriter, or teletype.<sup>6</sup>

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2. The device was first patented in 1714 in England by an engineer named Mills, but the first practical design was not obtained until 1867 when Christopher Latham Sholes, Carlos Glidden and S.W. Soule did so in Milwaukee, Wisconsin. Remington's machine was based on this design. See DONALD HOKE, INGENIOUS YANKEES: THE RISE OF THE AMERICAN SYSTEM OF MANUFACTURE IN THE PRIVATE SECTOR 141-150 (1990); see also 12 THE NEW ENCYCLOPAEDIA BRITANNICA 86 (15th ed. 1997).

3. The manuscript was likely for Mississippi Story. See ALBERT BIGELOW PAIN, MARK TWAIN: A BIOGRAPHY 535-38 (1912) (containing a digital representation of a photograph of the first letter Twain typed on a typewriter) cited in Jim Zwick, *A Typewriter, and a Joke on Aldrich* (visited Mar. 24, 1999) <[http://marktwain.miningco.com/library/biography/bl\\_paine\\_bio\\_ch099.htm](http://marktwain.miningco.com/library/biography/bl_paine_bio_ch099.htm)>.

4. *Id.* The quotation is from a letter that Twain wrote to his brother, Orion Clemens. See *id.*

5. *See id.*

6. *See* LEWIS COE, THE TELEGRAPH: A HISTORY OF MORSE'S INVENTION AND ITS PREDECESSORS IN THE UNITED STATES 20 (1993). Elisha Gray was the inventor who lost out to Alexander Graham Bell by a few hours in receiving a patent on the telephone. For his efforts with the telegraph, he may well be considered the great-grandfather of the Internet. See also IRWIN LEBOW, INFORMATION HIGHWAYS AND BYWAYS: FROM THE TELEGRAPH TO THE 21ST CENTURY 36, 41, 196 (1995).

In 1890, William Seward Burroughs put his business adding machine into production, but it was not to become successful until 1898. Mr. Burroughs founded the Burroughs Corporation, and his machines became standard equipment in most American offices until they were replaced by modern electronic calculators.<sup>7</sup>

In 1895, Guglielmo Marconi demonstrated the first wireless transmission of electromagnetic signals.<sup>8</sup> The telegraph, however, was the dominant means of long-distance communication, and Marconi's technology was not to be exploited for several more years. Marconi's main interest was in ship-to-shore wireless transmissions for the maritime industry.<sup>9</sup> Radios continued to be viewed as experimental devices or expensive toys for several more years.<sup>10</sup> The first commercial broadcasting station did not go on the air until 1920.<sup>11</sup> The famous case of *The T.J. Hooper*,<sup>12</sup> in which Judge Learned Hand effectively made radio receivers standard equipment in sea-going tugboats was decided in 1932.

We can see then, that the last decade of the 19th century was a period of great inventiveness. However, with some notable exceptions, the general pattern of development and usage indicate that these useful devices were developed at a fairly leisurely pace and many were developed as curiosities or entertainment devices. Technology did not occupy such an important place in our working culture, and new inventions were not rushed to market and quickly replaced with the latest and greatest upgrade. However, once devices were developed to the point that they made work more efficient, they generally caught on . . . and stayed on. It seems that they underwent a period of casual acceptance in that part of peoples' lives in which they posed no real threat to the status quo. Once they were shown to have some value, then they were readily adopted as important and long-lasting tools for working with information.

Little evidence exists over this historical period to suggest that lawyers and judges either lagged behind or outpaced the rest of the community in employing new information systems. One item, however, was reported almost exactly one hundred years ago that stands out. A New York Times article describes a "New Use for the Telephone" in which a lawyer in Tennessee, who could not make it to trial because of a snowstorm, examined witnesses and gave his final argument over the phone.<sup>13</sup> He won the case, and the article concludes by stating: "There

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7. See BRYAN MORGAN, TOTAL TO DATE: THE EVOLUTION OF THE ADDING MACHINE: THE STORY OF BURROUGHS 30, 47 (1953); see also National Inventors Hall of Fame Website, William Seward Burroughs (visited Mar. 24, 1999) <<http://www.invent.org/book/book-text/17.html>>.

8. See ORRIN E. DUNLAP, MARCONI: THE MAN AND HIS WIRELESS 17 (1971); see also ORRIN E. DUNLAP, COMMUNICATIONS IN SPACE: FROM MARCONI TO MAN ON THE MOON 7 (1970).

9. See STEVEN LUBAR, INFOCULTURE: THE SMITHSONIAN BOOK OF INFORMATION AGE INVENTIONS 102-107 (1993).

10. See *id.* at 214.

11. See *id.* at 34.

12. *The T.J. Hooper v. Northern Barge Corp.*, 60 F.2d 737 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932).

13. *New Use of the Telephone*, N.Y. TIMES, Mar. 12, 1899, at 1.

is much interest among lawyers as to whether it will serve as precedent.”<sup>14</sup>

Others did not approach technology with such optimism. In 1899, at the end of this decade of extraordinary inventiveness, Mr. Charles H. Duell, who was Commissioner of the United States Office of Patents, uttered one of the most curious statements of the time. Possibly bowled over by the burst of activity that had occurred in the 90s, he declared that the Patent Office should be abolished because “everything that can be invented has been invented.”<sup>15</sup>

## II. ADOPTION OF LEGAL INFORMATION TECHNOLOGY IN THE MODERN LEGAL SYSTEM

This historical thumbnail sketch contains no surprises: we have come a long way. But, after all, an entire century has passed since that bygone age of inventiveness, and the devices of that time are bound to seem primitive and quaint. However, the rate of change can be better appreciated when these developments are placed on a time line. For one hundred years, the typewriter was the machine of choice for word processing. Advances? Yes, but its basic function remained the same throughout that period. It remains in use in some quarters, but the personal computer has rendered it obsolete in virtually every business and law office. During that same period of time, separate machines were used for creation, storage, and manipulation of documents and the information that they contained. All of the machines used in those various functions did so in only in print form. In mid-twentieth century, few could have presaged how common central processing units, integrated function software, searchable databases, electronic communications networking, and laser technology would have become in law offices and courthouses. If personal computers with Internet connections and e-mail software, fax machines, and photocopiers were to suddenly disappear from law offices, those offices would simply not be able to continue to deliver legal services in the ways that clients have learned to expect.

Today in some courtrooms across the country, lawyers, judges, and court administrative personnel are using personal computers equipped with software and peripheral devices enabling them to more efficiently present and manage evidence. With the use of scanners, documents and images of non-documentary evidence can be converted into digital form for storage and retrieval. The medium for storage is CD-ROM, enabling storage of massive amounts of material in a lightweight and portable form from which the stored material can be quickly retrieved. “Light pens” connected to these computers can be passed over bar-coded labels in a trial notebook to instruct the computer to find, retrieve, and display on the screens of the participants the digital representation of the evidence so labeled in a matter of seconds.

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14. *Id.*

15. Kurt L. Glitzenstein, *A Normative and Positive Analysis of the Scope of the Doctrine of Equivalents*, 7 HARV. J. LAW & TECH. 281, 315 n.148 (1994) (citing Jack Smith, *Criticizing Inventions as Not an Incandescent Idea*, L.A. TIMES, Oct. 3, 1991, at E1)).

As testimony is given, computer-aided systems employed by court reporters can instantaneously translate the court reporters' stenographic symbols into digital form allowing the judges and attorneys to read the transcript on screen in "real time." With the use of document cameras, video cassette recorders and players, digital projectors, and presentation software, lawyers are supplementing their oral presentations of evidence and arguments to aid the triers of fact in their consideration of the evidence. Video conferencing enables participants to visually and orally communicate with each other without meeting in the same room and enduring the travel and inconvenience that face-to-face meetings require. Some courts have employed "electronic noticing" in which the courts' orders are sent by e-mail to the lawyers of interested parties.<sup>16</sup>

How are information systems likely to change the way legal work is done in the new millennium? Upon reflection, the past twenty five and past one hundred years should demonstrate the futility of attempts to prognosticate with any degree of precision. Some ideas of what might transpire can be gained, however, by taking some clues from developments that have already occurred. Just within the last decade the size, weight, and cost of personal computing equipment have decreased dramatically. At the same time, the power, speed, and capacity of these machines have increased. Continued development along these lines will enable larger proportions of the general population to use these tools more conveniently and in a wider range of applications. The personal digital assistants or PDAs of today will give way to or evolve into powerful hand held computers that will do what the best of our desk top computers can do and even more. The integration of personal computing and Internet technology with television technology that we are witnessing in its beginning stages will enable the expansion and improvement of information systems in general; legal information systems will enjoy parallel gains. Improvements in speed, bandwidth and storage capacity of the infrastructure servicing the "information superhighway" will give legal workers instant access to vast arrays of information. Improvements in indexing and search and retrieval technologies will allow users of legal information systems to conduct research with greater speed, accuracy and efficiency.<sup>17</sup>

Continued development of security measures will enable greater and greater amounts of information to be shared securely across the Internet.<sup>18</sup> Information providers, who have been utilizing Internet-based services only a few years or months, will reach mature status and with the development of more sophisticated

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16. See Monica Perin, *Seeing Is Believing in New Frontier of Electronic Trials*, 26 Hous. BAR J. 29, May 9, 1997.

17. See generally RICHARD SUSSKIND, THE FUTURE OF LAW: FACING THE CHALLENGES OF INFORMATION TECHNOLOGY, at x-xxi (1998) (providing more detailed and specific predictions). See also Stephen T. Maher, *Lawfutures, or, Will You Still Need Me, Will You Still Feed Me, when I'm Sixty Four?*, 1 RICH. J. L. & TECH. 6 (1995) <<http://www.urich.edu/~jolt/v1i1/maher.html>>.

18. See Karim Benyekhlef, *Dematerialized Transactions on Electronic Pathways: A Panorama of Legal Issues*, in THE ELECTRONIC SUPERHIGHWAY 93 (Ejan McKaay & Pierre Trudel eds., 1995).

and powerful equipment will be able to provide legal researchers with extremely current resources having high degrees of reliability and accuracy.

Continued development of voice recognition systems will enable oral testimony to be instantaneously digitized and transcribed into text capable of being read on a computer screen. Expansion of data storage capacity and improvement of retrieval capabilities will mean that entire records of cases will be easily accessible to legal researchers. The combination of these developments will make those records available to researchers almost as soon as they are created.

Greater quantities of increasingly sophisticated data will be usable across a wider spectrum of software applications. For example, lawyers may come to rely routinely upon legal "expert systems,"<sup>19</sup> designed to enhance the analysis of legal problems to aid them in providing advice and services to clients. More information currently available only in print form will be converted to digital form and placed on-line for electronic search and retrieval. Measurement of library holdings in bytes will become as important as the current conventional measurement in volumes.

### III. HESITANCY TO ADOPT TECHNOLOGY

Despite the widespread adoption of legal information systems and the ready embrace of other technology in many parts of the legal system, significant hesitancy or outright resistance remains in many quarters. This section presents a set of factors that are likely to affect the willingness to adopt technology generally with some consideration of their effects in the realm of legal work.

Observing technology indirectly as it interacts with humankind can sometimes evoke expressions of interest, perhaps even awe or contempt.<sup>20</sup> Observing the use of technology by others is something quite apart from using it to perform one's daily work functions. Many people remain hesitant to interact

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19. An expert system is software written with judgment rules drawn from experts in a given field written into the code so that when given a set of data and queried, the software returns information drawn according to logic based upon the judgment rules to enable the user to better evaluate the problem at hand. The technology is currently being used, for example in the medical field in the HELP system, in which, upon being queried about a patient's symptoms the software refers to a database of diseases, symptoms, blood chemistry and drug therapies to aid diagnosis. Early efforts in legal expert systems in law were demonstrated by Reed C. Lawlor and Fred Kort at the Second National Law and Electronics Conference in 1962. The systems presented by Lawlor and Kort were designed to predict the outcomes of judicial proceedings, using data drawn from United States Supreme Court cases involving right-to-counsel issues. See Reed Dickerson, *Some Jurisprudential Implications of Electronic Data Processing*, 28 LAW & CONTEMP. PROBS. 53, 54 (1963).

20. The 1996 chess match between Gary Kasparov and "Deep Blue," an IBM computer captured and maintained the attention of public media for some time. See *Kasparov Downs Big Blue to Win Series* (last modified May 6, 1997) <<http://www.usatoday.com/sports/other/chess30.htm>>.

with technology. A brief consideration of factors pertaining to that hesitancy and why it persists follows, including some suggestions for what should be done to address those factors.

#### *A. Reliability—or the Lack Thereof*

Technology is wonderful—when it works. Too often with today's hardware and software applications, it seems that the more complex the technology the higher the probability that it will fail when needed. Persons who are most comfortable with the employment of technology are often those with above-average familiarity with the basic processes underlying the systems as well as the troubleshooting techniques needed to solve operational problems. Lawyers and judges in the performance of their obligations do not want to risk the loss of credibility and authority that can accompany a technological failure. Electronic technology for legal information systems has improved significantly over a very short period of time, but systems engineers and developers must continue efforts to push failure rates closer to zero before full and widespread adoption can be expected. Reliability rates are much higher today than in the early days of the personal computer, but "stability" (i.e., reliability) remains as a major consideration in evaluating operating systems. When that aspect of new systems disappears as an issue, technology will gain new adherents.

#### *B. Authenticity*

A map is not the territory it represents, and digital representations of evidence are, of course, not the facts being represented. People have a natural and healthy skepticism about digitally-created representations. Computer-generated images portraying fantastic but realistically-appearing occurrences have become commonplace in television commercials and motion pictures. Some people see these manipulations of "virtual reality" and inductively conclude that it is easy to manipulate digital representations of documents and images. The technical features and visual appeal of digital presentations of evidence can be so impressive that underlying substantive weaknesses might be concealed.<sup>21</sup> For significant segments of the population, the concepts and parlance of computerized information systems are arcane and mysterious. Lawyers and judges, together with technicians and developers, should address the protocols for authenticating digital documents, signatures, and other electronic evidence which will allow triers of fact to evaluate such evidence without bias for or against the electronic form in which it comes to them.

#### *C. Convenience—or Lack Thereof*

This factor is related to the reliability factor in the sense that equipment that does not work properly is inconvenient. Here, the emphasis is upon expenditure

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21. Informal parlance in the field of information technology refers to this phenomenon as "The Gee Whiz Factor."

of time and effort to develop the skills necessary to use the technology even when it works as intended. For example, no one wants to spend hours producing an electronically-enhanced presentation of a piece of evidence unless the resulting presentation is more effective than a simple direct proffer of the actual physical evidence. Attorneys will not spend valuable time producing a digital presentation, lug several pounds of equipment into the courtroom, and spend even more time setting up the equipment unless the use of that system adds materially to the strength of the case.<sup>22</sup> The skills needed to manipulate sophisticated information technology are substantial, and the time needed to acquire those skills is not trivial. People doing legal (and other) work would rather be spending their time and effort doing that work rather than learning methods and operation of a new version of software. It may well be unreasonable to expect sophisticated systems to do their work simply by pressing the "on" button, but it is also unreasonable to expect widespread adoption of technology that is difficult to learn and complicated to use.<sup>23</sup>

Improvement of systems with the convenience factor in mind should be a byproduct of a multi-disciplinary collaborative effort between legal and non-legal workers. Systems engineers should apply increasing amounts of their resources to develop platforms and applications that are easier, rather than more difficult, to use than their predecessor systems. Legal information systems software developers should redouble efforts to consult directly with members of the legal system's workforce to learn where efforts aimed at improvements can be focused. Legal workers should actively communicate their needs and desires to developers. In litigation, the adoption of technology to aid the presentation of a case at trial will be out of the question if the actual use of that technology in the courtroom cannot be realistically anticipated. It is unreasonable to expect courts to provide connectivity for and facilitate employment of every conceivable system that lawyers might wish to use in courtrooms and in communications with the court. However, court administrative officers should develop within their staffs a continuing awareness of innovations in the field of legal information systems and be able to recognize standards that emerge which will enable those who adopt standardized systems to interact with the technology in the courts at

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22. This aspect of the problem is not new:

One of the most persuasive arguments against a specific use of technology in the law is that for the purposes of the particular problem, its language and methods are overelaborate. But whether an adequate mathematical model can be created and whether—if created—it is worth the effort and expense to program it for a computer, has not particular relevance here beyond the general point that a lawyer is always well advised not to use a method or device that is more complicated than his particular problem warrants.

Dickerson, *supra* note 19, at 65.

23. The Indiana University School of Law—Indianapolis, through its Program for Management of Legal Information Systems, with which the author has been involved since 1997, has begun to address some of these concerns with efforts to educate not only law students, faculty and staff, but also lawyers and judges in the use of electronic tools.

an optimal level.<sup>24</sup> Lawyers contemplating the use of technology in litigation should not assume that the court is completely "wired" and should seek permission to use technology that they plan to bring into the courtroom.

#### *D. Expense*

Prices for equipment and software that make up some legal information systems have rapidly declined in the past year, but technology in general remains fairly expensive. The basic investment is sizeable and upgrades become necessary as the technology continues to develop. Those who become interested in adopting technology soon confront the decisional paradox presented by the advice that one should not purchase technology until it is proven but one should not purchase technology that will soon be made obsolete by new advances. Few people outside the special realm of "beta testers" want to be a guinea pig for version 1.0 of new software, and fewer people want to purchase version 2.0 of that software if version 3.0 will be released in a few months without some price protection. Equipment leasing may be an attractive alternative to purchasing for some applications. Software vendors have become more sensitive to the problem, and many now offer incentives to purchase a piece of software late in its development cycle with subscription plans or free or reduced-price upgrades within specified periods. Decision makers for legal workers should explore with vendors all available cost-saving alternatives before committing significant financial resources to information systems technology. Most of those decision makers would not make comparable expenditures for medical intervention without seeking a second opinion. The same should be true in the purchase of information systems.

#### *E. Threat*

Two aspects to this factor are important: (1) technology that promises efficiency carries with it a potential for eliminating jobs;<sup>25</sup> (2) on a smaller scale,

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24. The Institute for Forensic Imaging, located on the campus of Indiana University—Purdue University Indianapolis, with which the author has been involved, has, since 1995, been working to improve the quality of visual evidence and develop a set of standard operating procedures or protocols for the authentication of digital images that will enhance the admissibility those images into evidence. More information about the Institute and its activities is available at its website <<http://www.advancetek.org/ifi/index.html>>.

25. See NICHOLAS A. ASHFORD & CHARLES C. CALDART, TECHNOLOGY, LAW, AND THE WORKING ENVIRONMENT (1991).

For industrial workers, these changes [wrought by mass production through assembly lines, specialized machines, standardized goods] meant a reduction in responsibility, security, and control of their work. As craft skills were replaced and supervision tightened, workers were treated more and more like an appendage to the machine, interchangeable with others, needing little in the way of education and training.

*Id.* at 4.

[These] [n]ew information technologies have facilitated the globalization of production

the thought of interacting with a powerful machine connected to a global network to manipulate huge volumes of information stored in mysterious and intangible "information warehouses" can be intimidating to some people. With respect to the former, those who think their jobs may be modified or eliminated by technology are not likely to warmly embrace it and may actively resist its adoption out of a sense of self-preservation. From the perspective of individuals affected by the adoption of new information systems, this may well be an intractable problem.<sup>26</sup> In many situations, however, the adoption of new technology presents new and additional opportunities for those who anticipate the change and prepare themselves by developing some expertise in the technology before the change. Regarding the second aspect, increasing the sophistication of technology necessarily takes it beyond the ken of persons not educated in the field and places it within the realm of mystery. Adoption may lag simply because the decision maker has not reached a comfortable level of understanding of what the system does and the risks it poses for those interacting with it. In addition, the more intrusive the technology becomes in managing the daily affairs of people, the greater the occasion for distrust borne of lack of understanding. So long as the development and control of technology remains in the hands of a small cadre of persons with specialized knowledge, the real potential for abuse and, just as importantly, the perceived potential for abuse remain. Information systems managers, developers and vendors should consider these sensitivities in pressing their objectives upon legal workers and continually renew their efforts to allay the concerns and address the problems that arise.

#### IV. ADDRESSING TECHNOLOGY-RELATED ISSUES IN THE LEGAL SYSTEM

The focus so far has been upon gadgetry, and though it is easy to compartmentalize thinking of technology as fully-embodied in gadgetry, this Symposium is about technology in a much wider sense. The concern here is about applications of knowledge and invention through the sciences and engineering to address the needs and problems of humankind whether or not they involve hardware and digitally-coded software.

In this broader sense, the advances we have made as a society over the past century are no less remarkable than the marvelous inventions we have come to

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by reducing the cost and increasing the speed of international coordination of economic activity. They have led to dramatic changes in the organization of production, making it possible to reorganize manufacturing away from dominant, standardized long-run mass production systems toward more flexible, shorter-run niche strategies. They have had widespread impact on the structure of industry and occupations and on the nature of work in the American economy. They have also created their own set of occupational health hazards.

*Id.* at 12 (citing *The Microelectronics Industry*, in 1 OCCUPATIONAL MEDICINE: STATE OF THE ART REVIEWS 1-197 (1985)).

26. For example, a librarian whose job will be eliminated when a county court closes a text-based library to convert to a CD-ROM based information system may face few, if any, options.

enjoy. When America was last poised upon the verge of a new century, the health, safety and well-being of its citizenry were matters of great concern in the public eye. From the perspective derived from one hundred years of breakthroughs and advances, life in the late nineteenth century appears to us as dangerous and unhealthy. A program of vaccination for diphtheria had begun in 1895, but by 1899, physicians still hotly debated the methods of combating the disease, with proponents of time-honored chlorine treatment on one side and advocates of antitoxins on the other.<sup>27</sup> Smallpox vaccinations had been in use for more than one hundred years, but sizeable outbreaks of the disease were still frequently reported throughout the country.<sup>28</sup> Congress, through a special court of inquiry, was conducting a sweeping investigation of meat-packing practices. In March of 1899, Theodore Roosevelt, then Governor of New York, testified about the extent of illness that canned beef had wreaked upon his troops when he commanded the "Rough Riders" in Cuba.<sup>29</sup>

On the more general plane of consideration of the relationship between law and technology, the problem becomes one of assaying the ability of the legal system to deal with new issues posed in the realm of human interaction by the development of technology. The development of new technologies sometimes brings with it a clash of interests, a modified status, or a new form of interaction for human beings that have not been anticipated.<sup>30</sup> The law has sometimes been seen as laggardly in its response to such issues:<sup>31</sup>

Today science does not remain isolated in laboratories; it becomes involved with human life almost instantaneously. The protective time barrier between creating knowledge through science and applying knowledge through technology has disappeared. . . As the gap between scientific creation and technological development disappears and as the rate of technological innovation increases, the law loses its time for reflection. The profusion of new legal problems removes the period of contemplation that lay behind the law's taking a decisive, calculated direction.<sup>32</sup>

With respect to some problems the resolution, if one is at hand, may simply

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27. See *Chlorine for Diphtheria*, N.Y. TIMES, Mar. 8, 1899 at 7.

28. See *Smallpox in a Hospital*, N.Y. TIMES, Mar. 1, 1899, at 3; *Students Leave Princeton: Smallpox Scare Drives Them Away*, Mar. 2, 1899, at 3; *Smallpox in a Hospital*, N.Y. TIMES, Mar. 6, 1899, at 2; *Smallpox in the South*, N.Y. TIMES, Mar. 16, 1899, at 2; *More Smallpox Cases at Fall River*, June 11, 1899 at 3.

29. See *Roosevelt on Army Beef: Testifies that the Canned Roast Stuff Sickened His Men*, N.Y. TIMES, Mar. 26, 1899, at 2.

30. See ASHFORD & CALDART, *supra* note 25, at 3.

31. See Wendy R. Leibowitz, *High-Tech Need, No-Tech Courts: Judges Move Slowly to the Web*, THE NATIONAL LAW JOURNAL, (Dec. 1, 1997) <<http://www.ljx.com/tech/wendy/wendy63.html>>.

32. OLIVER SCHROEDER, JR., *THE DYNAMICS OF TECHNOLOGY: FROM MEDICINE AND LAW TO HEALTH AND JUSTICE* 58 (1972).

be a matter of applying existing principles of law to the issue posed by the new technology. The issue of whether a user of technology accepts the offer of an Internet-based vendor when she clicks on the "submit" button at the vendor's website ought to find resolution in existing commercial contract principles, for example.<sup>33</sup> Principles of the law of privacy should be applicable in disputes about whether the manufacturers of a new computer chip that automatically identifies the computer owner and supplies information about the owner to others connected to the same network has enabled others to invade the privacy interests of the computer owner. Principles undergirding public policy against commerce in babies should be able to guide decisions about whether persons who have offered to purchase the eggs of a woman of specified physical and intellectual attributes are engaged in socially-acceptable conduct.

On the other hand, the problem may be a matter of whether existing principles of law do or should address the matter at all. For example, astounding technological breakthroughs in the human reproductive process have given rise to issues such as: (a) what should be done with frozen embryos when the male and female, who supplied the sperm and egg for the embryos, die; (b) whether cloning a human being ought to fall within the category of prohibited conduct; (c) whether it is appropriate for reproductive scientists to perform impregnation procedures upon persons whose medical circumstances present relatively high probabilities of multiple births when their other life circumstances raise doubts about their ability to care for several children; (d) whether parents of embryos exhibiting evidence of non-fatal genetic disease should be permitted to discard the embryo in favor of one without the undesired genetic markers?

Professor Steven Goldberg, in his thoughtful analysis of the relationship of law and science in America, makes the point that some lack of synchronicity between the development of technology and the law's ability to address it is inevitable because of science's emphasis upon progress and law's emphasis upon process:

Thus the fundamental difference in values between science and law is subtle, but important. Science is not a compendium of timelessly true statements. It is, in a sense, a process for formulating and testing hypotheses that are not always open to revision. But in science this process is a means to an end, and that end is progress in our knowledge of the world. In law, process is not simply or primarily a means to an end. In an important sense, process is the end. A fair, publicly accepted mechanism for peacefully resolving disputes is often the most one can reasonably ask for in human society. As Justice Felix Frankfurter wrote in an opinion for the U.S. Supreme Court, ". . . the history of liberty has largely been the history of observance of procedural safeguards."<sup>34</sup>

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33. See Chris Swindells & Kay Henderson, *Legal Regulation of Electronic Commerce*, 3 J. INF. L. & TECH. (Oct. 30, 1998) <<http://www.law.warwick.ac.uk/jilt/98-3/swindells.html>>.

34. STEVEN GOLDBERG, CULTURE CLASH: LAW AND SCIENCE IN AMERICA 19 (1994).

## CONCLUSION

A brief examination of the history of the development of technology related to information systems and its adoption in the legal system shows that, generally, the legal system is able to positively address advances in technology, and that, in many respects, recent advances have transformed the way in which legal work is done. Some lag may occur, and a full embrace of modern technological gadgets by the legal system may remain in the realm of speculation. Reasons for the lag are susceptible to analysis; however, a consideration of the factors of technological reliability, authenticity, convenience, expense and threat by those responsible for the development and adoption of electronic tools in the legal system should aid in the reduction of that lag.

Gaps may arise, and fortunes may hang in the balance as the courts and legislatures of the land struggle with the more profound problems posed by advancements in technology and issues never before contemplated confront us. Participants in the legal system on all fronts should avoid abdicating the responsibility to engage in the struggle to decide, even though completely satisfactory decisions may elude early efforts. An examination of our society's historic relationship with technology reveals its Janus-like capabilities: It is capable of wondrous life-preserving or life-destroying application, and persons alive today have witnessed its awesome powers of destruction as well as its powers of creation. Ironically, the antidote to the ills of technology may well have been best articulated by an operative of a hateful regime who well-appreciated the destructive power: "Today the danger of being terrorized by technocracy threatens every country in the world. In modern dictatorships this appears to be inevitable. Therefore, the more technical the world becomes, the more necessary is the promotion of individual freedom and the individual's awareness of himself as a counterbalance."<sup>35</sup>

So long as the courts remain open to the assertions of individual awareness and freedom and remain willing to fashion remedies that do justice to those whose interests have been injured, so long as legislatures remain committed to keeping open avenues of expression of individual awareness and freedom in their resolution of competing claims to public goods, the dangers of technology can be ameliorated while the benefits can be enjoyed on a wide scale.

My role in this Symposium remains an introductory one, and so I shall not engage in these questions in depth. Other presenters will take up specific questions within this larger field of inquiry. Professor Michael H. Shapiro, Dorothy W. Nelson Professor of Law at University of Southern California, and author of Bioethics and Law, takes on the sweeping question of whether the advances in medical technology surpassed the ability of the current legal framework (herein "bioethics"). He addresses that question with an equally-sweeping analysis with perhaps some surprising suggestions and conclusions.

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35. Albert Speer, Transcript of International Military Tribunal, Nuremberg, Germany, 31 August 1946, at 405, *quoted in* OLIVER SCHROEDER, JR., THE DYNAMICS OF TECHNOLOGY: FROM MEDICINE AND LAW TO HEALTH AND JUSTICE 31 (1972).

David Orentlicher, Samuel R. Rosen Professor of Law and Co-Director of our own Center for Law and Health, will respond. Professor Fred H. Cate, Professor of Law and Director of the Information Law and Commerce Institute at Indiana University School of Law—Bloomington and the author of *Privacy in the Information Age*, among other works, considers in depth the debate prompted by the development of information systems that have been built upon the collection and dissemination of private information. Professor Ronald Krotoszynski, one of our own faculty members and an expert on communications law, will respond. Henry Perritt, Dean of the Chicago-Kent College of Law, author of *Law and the Information Superhighway*, among many other works related to technology and law, reflects upon the connection between law and information technology and the ramifications that connection poses for legal education. Michael Heise from our faculty, Professor of Law and Director of the Program on Law and Education will respond.



# IS BIOETHICS BROKE?: ON THE IDEA OF ETHICS AND LAW “CATCHING UP” WITH TECHNOLOGY

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## INTRODUCTION: THE TOPIC—WHAT DOES IT MEAN?

### A. *In General*

In its grandest form, the topic of this Symposium is “Law and Technology in the New Millennium,” and the subtopic I was asked to address is “Do law and ethics have to catch up with science and technology?”<sup>1</sup> Whatever one

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#### 1. To be precise

The theme of the symposium is whether technological developments have outstripped the ability of legal ideas, processes, institutions, and the profession to address some of the issues presented by those developments. . . . The question [is] whether the advances in medical technology, such as those in the areas of genetics or transplantation, have surpassed the ability of the current legal framework to address them.

E-mail from Kristyn E. Kimery, Symposium Editor, *Indiana Law Review*, Volume 32 (Jan. 21, 1999) (on file with author). The idea has been expressed many times. See, e.g., Courtney S. Campbell, *In Search of a Reason to Clone*, 12 MED. HUMAN. REV. 80 (1998) (“A commonplace lament of contemporary bioethics is that ethics and law are continually racing to catch up with scientific research.”).

understands by the latter formulation, it is a sprawling subject. I will try to impose some order on it by addressing the following questions and issues:

1. *Some Constituent Issues.*—The question “Do law and ethics have to catch up with science and technology?” is not entirely bereft of meaning, though it is hard to say what it is. This is not meant as a complaint about the symposium framers’ formulation; it is frequently heard in all quarters—from persons on the bus, scientists, and professional commentators. Its very awkwardness is instructive. It seems reasonable to assume that something coherent and important underlies the question, though when stated more rigorously it might be less catchy. Trying to unearth this something leads to several groups of questions concerning: (a) what constitutes progress in moral behavior; (b) what constitutes progress in moral theory or philosophy; (c) certain aspects of law and legal theory and what constitutes progress in these spheres; (d) the idea of scientific and technological change or progress and how it differs from that of moral and legal change or progress; (e) how these distinct inquiries are linked; (f) whether these different domains of progress are sufficiently commensurate to allow us to compare rates of progress; and, finally, (g) what a coherent reconstruction of “law and morality lagging behind technology” might mean, if anything.

Of course, being led to these issues is one thing; resolving them is another, and in some cases it is impossible.

2. *The Planned Analysis.*—I will focus upon biological technologies and some of the legal, moral, and general philosophical discourses applied to them. We often call these discourses “bioethics” or, for our purposes, “bioethics and law.” This is a field that must be evaluated when asking whether law-and-ethics have lagged behind science-and-(bio)technology. Perhaps such probing can help explain what is outpacing what and on what sort of roadway.<sup>2</sup>

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Although in various contexts the terms “moral” and “ethical” have different meanings (the latter is often applied to canons of professional behavior, for example) I use them interchangeably here.

2. “Technology assessment” is a related field of inquiry that has been pursued, from time to time, by the federal government. The Congressional Office of Technology Assessment ceased to exist on Oct. 1, 1995. *See Newt’s Science Breakfast Club?*, 270 SCIENCE 223 (1995). The Office of Science and Technology Policy (in the Executive Office of the President), 42 U.S.C. § 6611 (1994), formed the National Bioethics Advisory Commission within the Executive Branch. The Commission was to be “charged to consider issues of bioethics arising from research on human biology and behavior, and the applications of that research.” National Bioethics Advisory Commission Proposed Charter, 59 Fed. Reg. 41,584 (1994). The Commission has since produced various reports and studies. *See, e.g.*, CLONING HUMAN BEINGS: REPORT AND RECOMMENDATIONS OF THE NATIONAL BIOETHICS ADVISORY COMMISSION (1997).

Some readers may view bioethics as a subcategory of “technology assessment.” If the latter phrase is interpreted broadly, this might be so. Others may think the reverse—that technology assessment is a part of bioethics. Some assessments are oriented toward listing and quantifying certain kinds of agreed-upon sets of risks and benefits rather than probing into normative and legal foundations and applications. However, the former Office of Technology Assessment regularly addressed distinctively bioethical issues in the course of its assessments. *See, e.g.*, OFFICE OF

The “disciplines”<sup>3</sup> of bioethics and of bioethics and law are hard to characterize because of the multiplicity and diversity of their spheres of activity and of their practitioners’ pursuits. There is no unitary “bioethics.” Nevertheless, the assembled fields have a near-defining characteristic: because of the technological rearrangement of basic life processes, the resulting issues are hard to track within our existing normative and legal architecture. Still, the assemblage is not ineffable, and I will try to show why many of the problems generated by biological technologies are structurally different from those driven by other technologies.

As is often so, what is distinctive or novel depends in part on the level of abstraction involved and on the features of existing baselines. There is nothing new about human reproduction, but acquiring precise knowledge of certain traits of developing offspring through prenatal screening is novel. Investigating why bioethical problems seem particularly intractable at any of these levels may explain why some think we are being outrun by our technologies.

After mentioning the singular characteristics of some bioethical problems, I will then outline how bioethics has dealt with them, but I will do this by addressing and critiquing the critiques of bioethics. I will also try to elaborate

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TECHNOLOGY ASSESSMENT, INFERTILITY: MEDICAL AND SOCIAL CHOICES 35-37 (1988).

3. It may seem fussy to comment on this term, but doing so illustrates some analytical problems that have to be faced here. It is too simple to say the discipline is whatever we say it is because we have to decide what we *ought* to say it is. To compare and contrast the disciplines of chemistry and physics is not that hard, even conceding their obvious links and the perennial efforts of some physicists to reduce everything to physics. But the discipline of bioethics? In our context, it refers at least to systematic study of several fields with a view toward understanding the material issues and making recommendations for appropriate action or inaction. Specifying these fields is dealt with briefly in the text. Bioethics of course implicates a formidable array of other, independent disciplines: the study of law and legal process; philosophy generally and moral and political theory in particular; the social and behavioral sciences; and the physical and biological sciences. Because we are in an academic legal setting, it is especially appropriate to ask whether legal analysis of the body of legislation, common law, administrative processes, and the nature of other legal systems is part of bioethics. I think it is and it seems to be so regarded by many, but I would not want to be responsible for defending this to the editorial board of the Oxford English Dictionary. For their take on “discipline,” see IV OXFORD ENGLISH DICTIONARY 734-36 (2d ed. 1989). As indicated in the text, the term will refer to the systematic study of the legal, medical, scientific, philosophical, social, political and economic problems I describe; the literature reflecting and communicating this study; the body of common law, legislation, administrative regulation, and custom in dealing with these problems; and the various institutions constructed to aid in assessment and decision making, such as ethics committees, Institutional Review Boards, Government-sponsored Commissions, etc. In this sense, the U.S. Supreme Court was “doing bioethics” when it decided *Vacco v. Quill*, 521 U.S. 793 (1997) (holding that under the circumstances there was no equal protection violation in banning assisted suicide); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding that under the circumstances there was no liberty interest in securing assistance in suicide); and *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990) (dealing with the nature of the liberty interest in refusing medical treatment).

upon possible meanings of the we-must-catch-up-with-technology exhortation and indicate some major confusions of expression or thought that it reflects.

If I achieve anything in this paper, it will be a “meta-showing” about our ethical and legal theories and behaviors and about how we can and should do the catching up we are urged to do. The “showing” is this. (a) Saying that {morality/moral philosophy/law} must catch up to {science/technology} reflects our discomfort with certain aspects of our technological societies. Nevertheless, (b) it seriously misconceives the nature of, and connection between, these differing domains to talk this way, at least without substantial qualification. (c) The only forms “progress” can take here, improvements in moral behavior aside, involve (i) incremental improvements in our thinking about critical moral and legal concepts that (ii) may allow individuals to better discern morally and legally relevant considerations and (iii) heighten the prospects for consensus, but do not and cannot provide determinate answers for all serious moral and legal issues. Such progress may facilitate individual reflective decision, although the decisionmakers may recognize both that others may decide otherwise and that individual views may not reflect an objective moral reality.

The main progress in such circumstances, then, is not that greater efforts dazzlingly reveal moral truths that all must acknowledge, but that individual moral agents acting in good faith will believe that their positions are adequately defended.<sup>4</sup>

These efforts to characterize and reconstruct the catch-up admonition bump into a fundamental problem in jurisprudence and in legal philosophy generally: analyzing the link between moral evaluation and legal process, especially formal adjudication.<sup>5</sup> Laws and judicial decisions, after all, are often criticized for failing to follow the right moral path or of being insensitive to morally relevant perspectives. The former complaint, standing alone, is generally no basis for concluding that law has to catch up with technology; the right moral path is often precisely what is contested. The latter protest suggests a basis for reforming law but presupposes some agreement on what the morally relevant perspectives are.

I will not review the history of bioethics,<sup>6</sup> although I will consider past examples of putative catching-up, as well as possible future ones. Of course, recording certain developments as progress presupposes some resolution of what “progress” means. There may be some consensus, however, that the workings

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4. This is not “moral relativity.” Cf. William A. Galston, *Value Pluralism and Political Liberalism*, 16 PHIL. & PUBLIC POL’Y. 7, 8 (1996) (“Value pluralism is not an argument for radical skepticism, or for relativism. The moral philosophy of pluralism stands *between* relativism and absolutism.”); Dan W. Brock, *Public Moral Discourse*, in SOCIETY’S CHOICES: SOCIAL AND ETHICAL DECISION MAKING IN BIOMEDICINE 215, 236-37 (Ruth Ellen Bulger et al. eds., 1995) (discussing moral relativism); *see also infra* note 268 (discussing “justificatory relativism”).

5. For a recent lucid commentary on this problem, see Kent Greenawalt, *Too Rich, Too Thin*, in THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 1 (Robert P. George ed., 1996).

6. For historical reviews and analyses, see generally DAVID J. ROTHMAN, STRANGERS AT THE BEDSIDE: A HISTORY OF HOW LAW AND BIOETHICS TRANSFORMED MEDICAL DECISION MAKING (1991) and ALBERT R. JONSEN, THE BIRTH OF BIOETHICS (1998).

of the discipline have altered thought and conduct for the better in some areas. As Jonsen and Toulmin observe, “[t]he medical profession [prior to the 1960s] had slowly achieved a moral preeminence that almost ruled out debate about medical ethics.”<sup>7</sup> That very debate transformed notions about physician authority and informed consent, a change that should count as progress by those who consider autonomy an important value. Furthermore, those renovated notions, whether viewed as new normative insights or old insights made more salient, seem linked to advances in legal and medical behavior, although it is hard to fix the direction of causality. Our conceptual understanding, the quality of our moral deliberations, and our behavior seem to have improved, a point that can tentatively be accepted even without a coherent theory of progress—which may never be available. Cases such as *Cobbs v. Grant*,<sup>8</sup> replacing disclosure customs of physicians as the informed consent standard with a needs-of-the-reasonable-patient standard; the crystallization of rights to and against treatment; the development of Institutional Review Boards; the specific articulation of slighted perspectives and voices; the very recognition of certain ethical and legal problems in health care; and the development and use of biological technologies—all are advances of sorts.<sup>9</sup> However, thinking this is all progress does not make it so; we cannot stop here.

### B. Dissing Bioethics: A First Look at Why It Don't Get No Respect (or at Least Not a Lot)

Some specific and oft-made criticisms of bioethics and of bioethics and law<sup>10</sup> will be laid out briefly as I move along. Here I note one of my conclusions in advance. To ask “What is wrong with bioethics?,” a question that seems to presuppose that ethical and legal progress lags behind science and technology, is hugely ambiguous. A claim that bioethics as a discipline is seriously infirm may mask a series of different beliefs and viewpoints. For example, such a claim could result from a substantive, bottom-line disapproval of proposed conduct, or of a state of affairs, rather than from a consideration of which bioethical

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7. ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING 304-05 (1988).

8. 502 P.2d 1 (Cal. 1972) (adopting the “reasonable patient standard” for informed consent, in place of exclusive reliance on physician practice).

9. For example, the development of the informed consent doctrine has its dark side. Candidates for imperfections include burdens of disclosure that may be too onerous resulting in misallocation of medical resources and increases in health care costs; excessive reliance on the “informed consent,” i.e., the disclosure papers to be signed, as the entire process of securing fair assent; adoption of informed consent standards that simply ratify current practices, good or bad; and so on.

10. Recall that “bioethics” here includes whatever other disciplines and forms of social ordering that inform and partly constitute its deliberations. There is a minor problem about whether critiques of bioethics are themselves part of bioethics—a kind of self-referential puzzle—but it is well worth ignoring.

processes of reasoning and argumentation are deficient. As for the latter, one may think that bioethical processes are logically flawed; empirically unrealistic; perspectively incomplete, i.e., akin to “false consciousness”;<sup>11</sup> laced with conflicts of interest, dishonesty, or corruption; oriented toward upholding the establishment and its values; oriented toward up-ending existing values to further radical goals; mired in theory and thus insufficiently attentive to situational particulars and the need for bottom-line conclusions; mired in situational details, inadequate heuristic guides, and ad hoc battle plans, and thus insufficiently attentive to theory, and so on. (If indeed bioethics is, or is doing, all these things, it cannot be all bad.)

I will conclude that, for the most part, no such core deficiencies in bioethics exists—nothing to match, say, a healing theory that disavows the germ theory of disease, or a school of cosmology that ignores gravitational effects. There is, for example, nothing in bioethics akin to moral, legal or public policy analysis premised upon the notion that certain minorities have only the merest touch of the elevated mental and emotional capacities of the majority, and are thus far less entitled to the respectful consideration of others.<sup>12</sup>

If bioethics is not so bereft, in what sense is something “wrong” with it? True, if results seem consistently wrong to any given observer, then the substance and procedure residing within the discipline should be scrutinized. However, if the complaints are largely result-oriented, then the disagreement<sup>13</sup> is really about

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11. I use this term several times here. It is frequently used to describe a group’s general thought patterns and ideologies when they are formed without adequate knowledge of or attention to important moral/political perspectives. The elite in any society, for example, may have no adequate idea of the needs, aspirations, abilities, suffering, or indeed the human worth of persons in other classes. This sort of perspectival insufficiency also applies to persons, say, those brought up to think that the only proper role for women is childbearing and homemaking. See generally RAYMOND GEUSS, THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL §2, at 12 (1981). For an example of applying the term to individuals, see Gerald Dworkin, *Autonomy and Behavior Control*, HASTINGS CENTER REP., Feb. 1976, at 23, 25 (“[A]uthentic behavior leaves no room for ‘false consciousness.’”). Cf. THOMAS NAGEL, THE VIEW FROM NOWHERE 5 (1986) (“[O]bjectivity allows us to transcend our particular viewpoint and develop an expanded consciousness that takes in the world more fully.”). However, note Nagel’s later remark that “the detachment that objectivity requires is bound to leave something behind.” *Id.* at 87. Nagel also discusses these issues in Thomas Nagel, *Moral Epistemology*, in SOCIETY’S CHOICES: SOCIAL AND ETHICAL DECISION MAKING IN BIOMEDICINE 201 (Ruth Ellen Bulger et al. eds. 1995).

12. Recall *Plessy v. Ferguson*, 163 U.S. 537 (1896), and its claim that the sense of insult, injury, and stigma felt by black persons because of racial segregation in public transportation was simply their own construction of the situation and had no standing as a constitutional harm.

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

*Id.* at 551.

13. Pinpointing the disagreements present in moral disputes can be pretty difficult. Cf.

these results, and not primarily about deficiencies in the discipline. Opponents of the result will likely think ill of the quality of *any* discussion that defends it or *any* procedure that produces it, even if the discussion is relatively well-rounded and thoughtful. They may single out a stage of assessment at which they would have taken a different path, but this hardly establishes the infirmity of the process. If, for example, they complain that there is “too much emphasis on autonomy as opposed to community,” this is simply a moral-theoretic disagreement, however well- or ill-thought out, about autonomy and community. If the disciplines’ typical member overvalues autonomy, why is the discipline necessarily at fault? From the perspective of bioethics, one might symmetrically ask, “What is wrong with anti-bioethics? Why do you under-value autonomy?”

As suggested, for some observers, *any* process that reaches a moral conclusion they think wrong necessarily entails that the process is defective at some point. Of course, something may indeed be wrong. If the players on a little league team persistently run the bases clockwise, their training is probably askew. Defenders of mass murder or genocide are mistaken at the core. But, for those who rank-order certain claims (say, of autonomy) higher or lower than other kinds of claims (say of community) to ask, “What is wrong with the contents of your thoughts and the processes of your mind?” is lamentably arrogant, and, far worse, conceptually and normatively confused. For those who think that many bioethicists are systematically using the wrong tools, or assigning the wrong ranking to values under a governing standard that these bioethicists are too purblind to apprehend, the answer is simple: recruit more persons who think like you to get into the arena. Although I am not identifying a field of thought with its membership, a field may generate a differently-oriented literature with a change in personnel, while still remaining the same field.

Admittedly, there is not always a clear distinction between disagreeing with an outcome and attacking the processes and disciplines that yielded it. It may be hard to distinguish between the local football team improperly executing its tasks even with the best training, on the one hand, and the inadequacy of the overall football plans hatched by the coaches on the other. However, we manage with hazy distinctions in every field, a matter I return to later in discussing what could constitute progress in a given field.

The core point is that many critics of bioethics who disagree with particular outcomes believe they result from an incorrect moral ordering. If gender and cultural differences are improperly de-emphasized in the hands of various

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Nagel, *supra* note 11, at 206 (describing conflicts between natural rights theory and rule-utilitarianism).

The disputants may agree roughly on their substantive moral judgments of central cases, but they disagree over what is fundamental and what is derivative: They disagree, in other words, about the correct moral *explanation* of those substantive intuitions in which they agree. And this may in turn be connected with disagreements about less obvious substantive questions, which will be decided differently by the extension of different justificatory principles.

participants, the proper response is not “there is something wrong with the field’s methods as such,” but “let us recruit personnel with different views.” I suppose, however, one could plausibly say that a field is flawed because it is heavily populated with the wrong people, but one must distinguish between rival conceptual and normative systems and a field’s current membership. Neither can be reduced to the other. The U.S. Congress is not fundamentally flawed because at any given time it has more Democrats than Republicans or the reverse. Neither the Senate nor the House of Representatives is fundamentally flawed simply because the former acquitted President Clinton on much the same evidence that the latter used to impeach him. Perhaps it is acceptable to say loosely that “there was something wrong with Congress during the reign of the Republicans,” or “there is something wrong with bioethics as long as the male chauvinists in the field outnumber the female chauvinists,” but such claims are misleading because much could be changed through the substitution of personnel without even remotely reinventing anything. True, one might say that if the wrong crowd is attracted in the first place, then there is something inherently wrong with the field, but this requires supporting evidence and analysis.

### C. Some Clarifications Concerning Catching-up, Kinds of Critiques, and Ethical Theory

1. *Critiques of Discourse vs. Critiques of Technological Uses and Their Underlying Knowledge, Theoretical and Technical.*—Debates about technology and how we manage it often seem to shift without notice between critiques of ethical and legal evaluation, on the one hand, and critiques of the technological uses that draw our attention and dismay, on the other. Those who object to acquiring or using certain kinds of knowledge may criticize those who secured or applied it. They may also criticize writers who discuss these enterprises but fail to denounce them; or legislatures and courts that do not properly react; and possibly the false consciousness of a somewhat demented public.

If the critical reactions derive from a failure within bioethics to deal with material problems, or from infirm perception or reasoning, then the criticisms are at least partly well taken. However, if the disagreement stems from deep differences in values, it is misleading and question-begging to say that the discipline, or some segment of it, is at fault for anything other than taking a different position from that of its critics. Of course, those in deep moral disagreement are very likely to find their opponents guilty of material omissions and failures of insight. Although it is sometimes hard to separate critiques of applied technology from critiques of technology assessment, complaints about a technological use and complaints about how we morally and legally assess it are not the same.

2. *“Standard Ethics” vs. “New Ethics.”*—Some may ask whether bioethics is just standard ethics applied to certain problems in biological science and medicine or is some distinct and peculiar addition to ethical theory. One might ask a parallel question about legal theory. What are the differences between a novel application, a revision, or a replacement of a conceptual structure in moral or legal analysis? In some cases, there may be no difference, and if there is, it

may make no difference under the circumstances. Does the idea that separating and restructuring basic life processes “fragment” our preexisting concepts suggest that we need something new in ethics and law to guide us?<sup>14</sup> When half of a child’s genes come from one woman but gestation occurs in another, who is the “natural mother,” given the separation of begetting and bearing? If a man carries a fetus to term, as we are told may one day be possible, is he the natural mother? If we resort to the original intentions of the parties to the reproductive process, is this “new,” or an application of existing moral and legal notions of procreational autonomy? When one’s human identity as a functioning person is permanently lost but her body endures, who or what, if anything, is dead and who or what is not? Would recognizing this condition as death reflect new ethical theory, or a creative application of extant notions of what the death of one party means to others—the irrevocable absence of her conscious, interacting presence? Is what is “new” the intensity of our focus on some problem set? Think, for example, of a renewed interest in determinism and responsibility stimulated by findings of the inverse correlation between low levels of the neurotransmitter serotonin and poor impulse control; or of special attention to the possible moral claims of future generations, occasioned by the threat of irreversible changes that we pose to the human gene pool or the environment. Here, our moral-analytic tools and concepts have not changed at their core: our interests have changed, and we have creatively elaborated familiar ways of thought.

On the other hand, pursuing questions about the novelty of what we are doing is an enterprise with rapidly diminishing returns. The principal benefit of asking, “What’s new?” is that it secures our attention on matters relatively less investigated. In most circumstances, however, the appellations “new” and “old” convey only marginal information. For whatever benefit they provide, one must locate precisely at which point in an ethical or legal argument structure some idea or maneuver might plausibly be called new.

Thus, new biological knowledge, techniques, and entities that escape our evaluative frameworks change the domain of ethics and law, and this may shift our attention and inspire conceptual reconstruction. This does not mean, however, that ethics has been radically transformed. Metaethics and normative ethical theory do make progress of sorts (see Part IV), but they have not morphed into some ineffable new kind of moral analysis. If the complaint about ethics and law being laggards is that they have not renovated themselves into different kinds of structures, it is hard to understand it.

It is only at the lower levels of abstraction, then, that the question concerning “new” versus “old” ethics might be fruitful. Bioethical problems are novel, even

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14. See *infra* Part II.B; see also Ronald M. Green, *Method in Bioethics: A Troubled Assessment*, 15 J. MED. & PHIL. 179, 184 (1990) (stating that “[t]he third objection to characterizing bioethics as having moral philosophy as its core discipline stems from the challenge to received theory posed by the unusual and often novel questions raised in this field” and concurring with Clouser’s view that new technology “presses ethics ‘not to find new principles or foundations, but to squeeze out all the relevant implications from the ones it already has.’”) (quoting K. Danner Clouser, *Bioethics*, in 1 ENCYCLOPEDIA OF BIOETHICS 115, 125 (Warren T. Reich ed., 1978)).

radical in some respects, but not so in others, and not at every level of generality.<sup>15</sup> We all will thus continue to refer to the most general abstractions, e.g., good, bad, right and wrong; to rely on certain fundamental concepts of moral analysis, e.g., justice, fairness, autonomy, liberty, equality, and utility; to formulate moral theories embedding these notions; and to appraise these theories from a metaethical framework and apply them to real world problems.<sup>16</sup> That is, at the threshold, moral and legal analysis of technology will bring all the modern tools of philosophical and jurisprudential analysis to the problems at hand. Still, one notices differences of emphasis and order of difficulty in various bioethical problems. Such difficulties may inspire rethinking of conceptual structures and hierarchies in novel ways. Because of this, in some hard-to-specify sense, the ways in which we think may indeed change.<sup>17</sup> Changes in emphasis, placing previously sub-visible matters in italics, noticing things previously only dimly perceived—all are properly called changes in thinking, possibly sea changes. Such changes have long been under way as part of the development of bioethics and of moral and legal analysis of technology generally. The content of moral and legal analysis and the issues under discussion evolve through an ongoing cycle of revision and reconstruction. Whether we will view the results as truly new normative insights is unforeseeable.

Sometimes these new insights are inspired by changes in factual understandings that radically shift our attention. At some point, for example, a critical mass of persons in any political unit may come to realize that racial or minority groups are not just slightly more elevated than primates found in the wild, but actual persons who think, feel, and can be hurt emotionally and physically. In a later section, I discuss what might count as moral progress, and whether such partially fact-driven insights should be so considered.

To the extent that one separates secular ethics from theological analysis, much the same holds: there may be different emphases and applications, but there is no “new theology,” however stretched the present framework might be.<sup>18</sup>

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15. Daniel Callahan suggests that bioethics “represents a radical transformation of the older, more traditional domain of medical ethics,” while at the same time raising questions that “are among the oldest that human beings have asked themselves.” Daniel Callahan, *Bioethics*, in 1 ENCYCLOPEDIA OF BIOETHICS 247-48 (Warren T. Reich ed., 1995). Cf. Robert L. Holmes, *The Limited Relevance of Analytical Ethics to the Problems of Bioethics*, 15 J. MED. & PHIL. 143, 145 (1990) (discussing bioethics as a “branch of applied ethics” in the sense he specifies, and also as belonging to “substantive morality”—the process of making moral judgments).

16. See generally Green, *supra* note 14, at 180, drawing on Clouser, *supra* note 14, at 116.

17. See Michael H. Shapiro, *Law, Culpability and the Neural Sciences*, in THE NEUROTRANSMITTER REVOLUTION: SEROTONIN, SOCIAL BEHAVIOR, AND THE LAW (Roger D. Masters & Michael T. McGuire eds., 1994).

18. Cf. Green, *supra* note 14, at 182-84 (theologians in bioethics use the methods of philosophical analysis).

*3. The Demand for Answers and an End to OTOHs (E-Mail Jargon for “On the One Hand” and “On the Other Hand”).—*

*a. If others can answer the questions facing their disciplines, why can’t you?*—The complaint that current ethical analysis is a turtle chasing a hare often rests on a simple matter: such analysis may not provide answers, at least definitive this-is-the-way-it-is-and-must-be answers, to difficult moral issues. If a medical laboratory can determine cell counts within a narrow range of uncertainty, or that the fibula is fragmented, or that your zorch is inflamed, why is ethics unable to yield definitive answers? If it cannot, what good is it?

Here is a brief illustration of the sorts of expectations some have when appealing to the discipline of bioethics for answers.

Scientists trying to map genes think they are on the verge of figuring out how to build an artificial life form.

J. Craig Venter hopes to salvage DNA from dead bacteria to construct an artificial organism. His interest centers on a tiny bacterium called *Mycoplasma genitalium*. It lives in the human genital tract and lungs, causing no known disease, but has the distinction of having fewer genes than any other organism mapped so far, making it a good model for figuring out precisely which genes are essential for life.

“We are attempting to understand what the definition of life is,” said Dr. Venter of Celera Genomics Corp. in Rockville, Md. . . . “We are trying to understand what the minimum set of genes is.”

Before he goes any further, Dr. Venter said he wants advice from experts on ethics and religion. “We are asking whether it is ethical to synthetically make life,” he said.<sup>19</sup>

Well, he’s asking you a question. What’s the answer? O.K., you can do OTOH and OTOH for a while. Scientists and auto mechanics do this, but they come up with real answers a fair proportion of the time: it *was* the transmission; there *really are* tiny life forms that can infect us and make us sick. Why are you unable to answer Dr. Venter’s question? You really have fallen behind; you have to get up to speed, or we will have to replace you with smarter or differently educated people. Yes, that’s it. Remember how the physicists and chemists took over the life sciences and turned them into molecular biology and explained life, in a manner of speaking, and started raking in Nobel Prizes? After Watson and Crick came Baltimore and Temin and Gilbert and so on. We will find people better than you are. We will recruit the scientists themselves, who obviously know about *progress* and *answers*. All you know is how to endlessly incant “OTOH, OTOH.” You are either not a respectable *discipline* or not a *respectable* discipline. A *respectable discipline* takes questions and answers them, or at least tells you what an answer would look like. You people cannot even agree on what

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19. *Geneticists Plan Attempt to Create Artificial Life*, WALL ST. J., Jan. 25, 1999, at B2.

you are looking for, never mind what might constitute evidence of it.

These remarks reflect some serious misunderstandings, but it is no simple task to define them because there is no clear answer to why there are no clear answers. Indeed, entire fields of study try to explain why certain matters cannot be fully explained. Even though the call for definitive answers is naive, it is not stupid. Any account of this indeterminacy implicates huge domains of thought about how we ought to—and do—make moral and legal decisions, and about what might constitute advances in these processes. Progress in the quality of moral reflection, if there is any, is incremental and hard to identify. Indeed, given the very premise that answers are hard to find, how could we ever agree on what counted as progress without begging our questions? Whatever progress occurs may also be largely disvalued because it may not yield unique answers either. Moreover, the very idea of progress in moral reflection may be viewed as backward by some intuitionists and pragmatists. Not all serious moral decisions are made from the top-down, leading us to some final moral insight and judgment. Decisions are often bottom-up or at least bi-directional processes in which there is an initial notion of what is right or wrong or good or bad. Justification or rationalization is then sought, if sought at all, at the levels of normative ethics and some forms of metaethics.

Just as legal theories at various levels can be manipulated to yield different outcomes, conceptualizations at those levels can often be applied to justify inconsistent judgments. Moreover, if one's intuition yields a clear and apparently certain judgment, there may be little incentive to bother with inspecting possible justifications.<sup>20</sup> So, even if one thinks she has the right answer, the moral cacophony may remain. We either have answers without justification, or justifications without answers.

b. *The moral "oracle": Expertise and democracy.*—When the touted expert fails to deliver The Answers, our disappointment and anger are compounded because of our expectations.<sup>21</sup> We rely on forestry experts to tell us what rates of timber harvesting and reforestation are required to keep the forest in a more or less steady state. But whom do we ask to tell us if saving the forest is more important than saving jobs in the local economy? Economists? Philosophers? Lawyers?

Although some may think that ethics experts have special knowledge about rightness and goodness, that view is doubted by many, including most ethical theorists and "ethicists." Indeed, some modern democratic movements seem to reject the very possibility of special moral insight or expertise.<sup>22</sup> Perhaps it

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20. See Holmes, *supra* note 15, at 149-50; see also Baruch A. Brody, *Quality of Scholarship in Bioethics*, 15 J. MED. & PHIL. 161, 170 (1990) (discussing upwards-down and downwards-up models of moral analysis).

21. Perhaps this is linked to the view that happiness does not necessarily increase with technological development. See Charles Frankel, *The Idea of Progress*, in 6 ENCYCLOPEDIA OF PHILOSOPHY 483, 486 (Paul Edwards ed., 1967).

22. See Nagel, *supra* note 11, at 212 (contrasting scientific and moral expertise). Nagel states that

would be too strong to call it a mass delusion, but many within democratic systems think that one person's views on most matters are as good as another's. In particular, bottom-line moral conclusions are thought to be as fit for one citizen as for another if one assumes that the relevant situational facts are available to all. It may well be true, for example, as Professor Robert Holmes urges, that neither meta-, normative, nor applied ethicists can "make better moral judgments in particular situations than anyone else."<sup>23</sup>

Nevertheless, the romantic view persists in some quarters that courts, and perhaps some other officials, have special access to moral truths, either by virtue of training or special aptitude or both (see Part III.G.2.b). The basic rationales for free speech in a republic are not founded on a belief that personal views are equal across the board. They do include a belief that the "marketplace of ideas" is an effective way to avoid tyranny despite the presence of much junk commentary.<sup>24</sup> Our very penchant for recognizing rights suggests that we all need protection against implementation of the alarming views of others. Still, outside of religious contexts, there is only limited scope for strong deference to moral or even policy expertise, at least as far as the more populist citizenry is concerned.<sup>25</sup>

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there is much less room for expertise with regard to the moral and evaluative aspects of policy. Moral judgments are everyone's job, and while some people are better at them than others, the reasons behind them ought to be made available, for the purposes of public choice . . . . We do not live in a theocracy, where some people are thought to have a privileged and direct line to the moral truth.

*Id.* See also Scot D. Yoder, *Experts in Ethics? The Nature of Ethical Expertise*, HASTINGS CENTER REP., Nov.-Dec. 1998, at 11, 12 (providing a useful review of the idea of moral experts).

23. Holmes, *supra* note 15, at 147. See also Yoder, *supra* note 22, at 12. Yoder challenges what he sees as three assumptions regarding ethics expertise:

The first is that in order for there to be expertise in ethics there must be objective moral knowledge . . . . The second is that ethics expertise is ethics expertise—that there is a single type of knowledge or set of skills by virtue of which the academic scholar, the ethicist involved in public policy formulation, and the medical ethics consultant can all claim to be experts. The third is that professional expertise is equivalent to or at least requires specialization.

*Id.* Yoder states that "[t]he key is to see that expertise in ethics is connected with justification—a claim to ethics expertise is not based on the truth of one's judgment but on one's ability to provide a coherent justification for them." *Id.* at 13.

24. J.S. Mill's endorsement of plural voting, i.e., greater voting power for superior persons, reflects a different view of democracy. See John Stuart Mill, *Representative Government*, in UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 376, 381-90 (Dutton & Co. 1950). Mill seems to have had some later reservations about the recommendation; see also DENNIS F. THOMPSON, JOHN STUART MILL AND REPRESENTATIVE GOVERNMENT 100 (1976).

25. See generally Yoder, *supra* note 22; Jan Crosthwaite, *Moral Expertise: A Problem in the Professional Ethics of Professional Ethicists*, 9 BIOETHICS 361 (1995); Richard Delgado & Peter McAllen, *The Moralist as Expert Witness*, 62 B.U. L. REV. 869 (1982); Colloquy, *Bioethics, Expertise, and the Courts*, 22 J. MED. & PHIL. 291 (1997). For a discussion of the distinction

Moral expertise, however, may unearth a variety of paths to our bottom lines, and knowledge of these options is precisely where the expertise lies. Yoder quotes Ruth Shalit, a critic of the offerings of ethicists, who says that “[t]he philosopher’s recommendation depends on a set of criteria that is not agreed upon, but varies from culture to culture and, more and more, from individual to individual.”<sup>26</sup> However, this observation does not defeat the notions of expertise or progress in ethics and ethical theory. On the contrary, it helps reveal the very stuff of moral analysis, the competing criteria in question.<sup>27</sup>

Thus, the suggestion that “[t]he expertise of the moral philosopher leads to informed moral judgments, not necessarily to the right answer,”<sup>28</sup> seems sound, provided that one understands that the phrase “informed moral judgments” may itself be contested. “Informed by what?”, a skeptic may ask, and perhaps claim that a purported moral judgment is not properly informed because the criteria used to determine morality are improper, or because they have not been ordered properly so that conflicts can be dealt with adequately. Knowledge of this layer of uncertainty is itself part of a body of ethical understanding, and thus of moral progress, however paradoxical this may seem. Much the same applies to defending ethical expertise and progress as “facilitating” the “coherent justification”<sup>29</sup> of moral problems. What amounts to a coherent justification may be in dispute.

In thinking about moral expertise, focus again on the final moral judgment about particular conduct or a specific state of affairs. Robert Holmes may be right about “moral equality at the decision point,” but with this critical qualification. Unless one is a thoroughgoing intuitionist who believes in direct observation of moral reality—of the truth value of moral claims in particular situations<sup>30</sup>—one’s final moral judgment ought to be consciously informed by the recognition of morally relevant factors. Once revealed, they may seem obvious, but there are many obvious matters hidden from sight. How many of us always consider the moral relevance of conflicts of interest? Critics of Health Maintenance Organizations (HMOs), for example, emphasize the internal incentive systems that create conflicts of interest for physicians. Do they also realize that fee-for-service has its own obvious built-in conflicts of interest, such as physician incentives to overtreat and overcharge? Moral analysis can bring

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between “doing ethics” and “doing policy,” see Brock, *supra* note 4, at 218-19.

26. Yoder, *supra* note 22, at 13.

27. “Criterion” is a somewhat obscure term itself, but here it refers to matters of moral relevance as defined and expressed in rules, principles, standards, and even in maxims and moral heuristics generally. Although it is not a primitive term, I take it as such for now.

28. Yoder, *supra* note 22, at 14.

29. *Id.* at 14, 16.

30. See WILLIAM K. FRANKENA, ETHICS 14-15 (2d ed. 1973); see also Loretta M. Kopelman, *What Is Applied About “Applied” Philosophy*, 15 J. MED. & PHIL. 199, 203-08 (1990); cf. JEFFREY STOUT, ETHICS AFTER BABEL 157 (1988) (“The intuitionist and the theorist of moral sense leave us at the mercy of our feelings and hunches. The answer is not, however, to ignore feelings and hunches altogether. Without them, ethical theory loses contact with the data of moral experience.”).

the obvious to mind and render the nonobvious obvious. It cannot, however, always resolve indeterminacies at the point of decision, and here, expertise may well run out.

Thus, even if experts and non-experts are equal at the penultimate decision point, the skills of nonexperts may nevertheless be aided by the experts' moral analyses. The ideas of knowledge, expertise, and progress in moral inquiry do not and cannot rest on a belief in an objective moral reality that always provides firm and certain answers. There may be a moral reality, but it is a reality different from other realities, despite the parallels among them, and its reality cannot be reduced to some other form of reality.<sup>31</sup>

4. *Technology and Psychic Overload from "Too Many Options."*—There is at least one sense in which the claim that "technology has outrun ethics and law" is not that puzzling. People often complain of having too much information or too much choice<sup>32</sup> and perhaps even too many ethical theories on the philosophy supermarket shelves. The "too much" label is a somewhat tendentious description; we may well be better off overall with more information and opportunities.

Nevertheless, increased choice and knowledge bear certain costs, at least for some decision makers—e.g., a sense of oppression from a felt responsibility to assure the best outcome by canvassing all options and considering all information. It's easier and quicker to buy cereal from a convenience store than from a supermarket. The annoying but useful occurrence of regret also plays a central role here. There are many stores and many toasters. Hidden somewhere out there, alongside "the truth," is the "best toaster"—the perfect combination of function, quality, appearance, ease of operation, range of choice, and price. But, games and contests aside, seriously trying to find it through a complete search of every toaster on sale in the vicinity and beyond evidences derangement. Most of us will "satisfice." We may vaguely wonder if we made the best buy, because we certainly did not canvass all the choices, but this is unlikely to ruin our day.<sup>33</sup>

The problem with biomedical technology, however, is not simply that we have more options and information of the same sort that we had before—more toasters, more cereal, and more vehicles. We have new *kinds* of choices: choices over the traits of offspring (prenatal and preconception testing; cloning); choices concerning control of mind and behavior (antipsychotic drugs; intellect-

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31. See Yoder, *supra* note 22, at 13.

32. See, e.g., Gerald Dworkin, *Is More Choice Better Than Less?*, 7 MIDWEST STUD. IN PHIL. 47 (1982); Michael H. Shapiro, *Fragmenting and Reassembling the World: Of Flying Squirrels, Augmented Persons, and Other Monsters*, 51 OHIO ST. L.J. 331, 349-50 (1990) (suggesting that "[n]ew choice may . . . be too much choice.").

33. See generally David M. Grether et al., *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277, 301 (1986) (arguing that "the information overload idea—that too much information causes dysfunction—is a myth. Instead, when choice sets become large or choice tasks complex relative to consumers' time or skill, consumers satisfice rather than optimize."). "But they'll satisfice" does not answer the claim about dysfunction; it only partly *explains* why dysfunction may occur.

enhancing drugs); choices about lifesaving efforts (organ transplantation); and so on. Furthermore, we have new, possibly exaggerated visions of ourselves, our powers, and our progression. We may see our thought and behavior as less "free" and more "determined," and worry over the blurring of the boundaries between ourselves and other forms of life, or even machines. We encounter new difficulties of description and evaluation that may seem deeper and reflect far greater dangers than do those arising from choice in other contexts. The fact that we cannot get a precise fix on what these dangers might be makes matters worse because of the very namelessness of the risks. The range and difficulty of choice over matters we have never or only marginally dealt with before may seem to exceed our capacities for rational choice. What is that wretched state in which one permanently loses all faculties of thought and feeling, but one's bodily functions continue? Should we choose to say it is death because the person we knew seems irretrievably gone, despite his body's endurance? Who is the natural parent of a cloned offspring, or is there even any such thing?

This expanded range of choice reflects moral/conceptual difficulties, not just an increase things to choose from. However, this is not what prevents moral and legal analysis from gaining on technology. Such analysis does not progress or advance in the same way as technology. They are not even on the same race track. Determining how Sarah Jr. shall be constructed when we have her germ line in hand in an early embryo cannot be answered just by gathering more information, or running brilliant experiments, or even by getting smarter.

5. *The Quality of Debate "Within" Bioethics.*—Saying that many bioethical debates are weak is different from saying that bioethics is itself infirm because of inattention to substantive material matters, conflicts of interest,<sup>34</sup> false consciousness, the need to replace elderly paradigms, etc. The problems of bioethics, as I argue, don't go that deep. But there is a problem, not with bioethics' foundations, but with the quality of many debates within bioethics. Quality here concerns systemic analytical weaknesses that affect reasoning in all fields, as well as particular bad habits more associated with bioethics than with other fields.

I am not offering a demonstration of this backed by an extensive sampling of the now immense bioethics literature. A few examples of flawed arguments that are often repeated will do for now. True, this lack of rigor impairs the quality of my own argument, but quality is not an all-or-nothing matter.

Consider the debate about objectification, an important idea concerning a central premise of bioethical analysis. We are rightly concerned with the risk of transforming our view of ourselves as persons into a view of ourselves as manipulable objects. It is said that bioethics undervalues risks of objectification—our descent from persons to objects. Objectification, however, is one of the most heavily discussed issues in bioethics. Indeed, in bioethics

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34. See Peter D. Toon, *After Bioethics and Towards Virtue?*, 19 J. MED. ETHICS 17 (1993). See generally CONFLICTS OF INTEREST IN CLINICAL PRACTICE AND RESEARCH (Roy G. Spece, Jr. et al. eds., 1996) [hereinafter CONFLICTS OF INTEREST]; Miles Little, *Research, Ethics and Conflicts of Interest*, 25 J. MED. ETHICS 259 (1999).

more people credit the risk of objectification than discount it. If something is wrong with bioethics here, it is that it overestimates that risk. In any case, search the literature for articles that do more than throw the term around. You will find some—but they do not characterize the field.

Instead, you will find material suggesting that simply using the term “products” to refer to children born of artificial technology indicates that we have already plunged into the abyss and are treating, say, babies born of invitro fertilization (“IVF”) as things to be used as we wish.<sup>35</sup> There is zero evidence to back this up; there is not even evidence to support the colorable view that investing heavy monetary, physical, and psychic resources in creating the child will result in intrusive parental control designed to assure a proper return on the investment. Even the term “objectification,” used to describe a legitimate concern of bioethics, has itself been reduced to an analytically used slogan.<sup>36</sup>

You will also find writing that likens the life support maintenance of a dead pregnant woman until delivery of her child to using her as a flowerpot.<sup>37</sup> The

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35. See BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 19 (1989) (claiming that “our society is also coming to think of children as products” and offering an example—the use of the phrase “*the products of conception.*”); see also DOROTHY NELKIN & LAURENCE R. TANCREDI, DANGEROUS DIAGNOSTICS 17 (1989):

These metaphors of the body and mind [“systems,” “chemical building blocks,” “hardware,” “software”] have, in effect, objectified the person, who becomes less an individual than a set of mechanical parts or chemical processes that can be calibrated or well defined. This objective image of the person has encouraged the use of biological tests as means of classification and as instruments of control.

*Id.*

36. For an example of the inflated use of the idea, see the quotations from scientists in Sarah Lyall, *A Country Unveils Its Gene Pool and Debate Flares*, N.Y. TIMES, Feb. 16, 1999, at F1. Iceland, with an unusually homogeneous genetic pool said to be derived from Viking settlers over 1100 years ago without much additional genetic infusion, is now debating a new law “giving an Icelandic biotechnology concern the right to develop a giant database combining the health records, genealogical backgrounds, and DNA profiles of every person in Iceland.” *Id.* One observer, a scientist, said: “It is not right to use a population as a commodity in this way. . . . I fear that we could be used as a well-defined guinea pig population in the future.” *Id.* Another scientist said: “It’s akin to treating people as objects rather than human beings. . . . I flatly reject the notion that you have to make concessions on patients’ rights in order to do human genetic research.” *Id.*

Is the objection that this plan will benefit a private company? Would the critics withdraw their objection if the government were doing this? None of us believes that people should be treated as “guinea pigs,” but what does this plan have to do with such treatment? A broad-based social experiment in sharing medical information might not be a great idea and might violate people’s rights, but not every bad idea is bad because it objectifies, and not every invasion of rights constitutes objectification. The critics’ characterizations are all but useless. To the extent that such indefensibly broad characterizations are offered in bioethics, then *pro tanto*, the discipline is infirm. But of course, the discipline as a whole also includes commentaries such as mine.

37. “To what extent . . . should the common good of refusing to perpetuate images of women

metaphor is clumsy and offensive. Children aren't flowers or any other sort of object, living or nonliving. Is the risk of objectification here so clear that we are to suffer *two* human deaths instead of one? Where the burdens on a woman's *living* body are not at stake, there is no reason not to view a developing fetus as a person-on-the-way—indeed, we must.<sup>38</sup>

Still more writing urges us to discount serious reasoning and instead to evaluate new reproductive technologies on the basis of how repugnant the process and the product seem.<sup>39</sup>

You will even find circular arguments suggesting that certain actions or processes are simply wrong, apparently by definitional fiat or arbitrary stipulation. For example, "Surrogacy 'necessarily' commodifies women."<sup>40</sup>

None of this establishes that bioethics requires either reconstruction or deconstruction. It just suggests that some discussants should do a better job,

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as maternal backgrounds or flowerpots constrain a prospective father's preference for sustaining a postmortem pregnancy for more than a few days?" Hilde Lindemann Nelson, *Dethroning Choice: Analogy, Personhood, and the New Reproductive Technologies*, 23 J.L. MED. & ETHICS 129, 134 (1995). The reduction-to-flowerpots argument is also raised in Barbara Katz Rothman, *Reproductive Technologies and Surrogacy: A Feminist Perspective*, 25 CREIGHTON L. REV. 1599, 1603 (1992) (associating the idea with Caroline Witpick: Women are "just the flowerpot in which men plant it [i.e., "the little person"]"). The implication seems to be that only the men are interested in the little flower persons—reproduction is their idea.

38. Martha Field writes that "[i]t may seem peculiar that the state has a greater interest in preventing the fetus from being harmed than from being killed, but such is the case. . . . Nothing in Roe v. Wade contradicts the existence of a strong and legitimate state interest in the health of newborns. . . . The different and stronger state interest that exists when the mother intends to carry to term also helps to explain why the trimester system that applies to abortion has no application to controls on the mother-to-be." Martha A. Field, *Controlling the Woman to Protect the Fetus*, 17 LAW MED. & HEALTH CARE 114, 123-24 (1989).

39. See generally Leon R. Kass, *The Wisdom of Repugnance*, THE NEW REPUBLIC, June 2, 1997, at 17.

40. Isabel Marcus et al., *Looking Toward the Future: Feminism and Reproductive Technologies*, 37 BUFF. L. REV. 203, 214 (1988) (quoting Barbara Katz Rothman) ("Surrogacy *entails* the notion that one can rent a womb and can affix an arbitrary price tag on pregnancy, often \$10,000.") (emphasis added); see also 2 ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES, PROCEED WITH CARE: FINAL REPORT OF THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES 683-84 (1993).

The premise of commercial preconception contracts is that a child is a product that can be bought and sold on the market. . . . The commodification of children *entailed* by preconception arrangements ignores these essential values [that children are not commodities or instruments]. . . . Commercial preconception contracts *by their nature*—the exchange of money for a child—contradict one of the fundamental tenets of the Commission's ethical framework.

*Id.* (emphasis added). Perhaps the thought behind these remarks is less conclusory than their textual presentation suggests, but it requires some non-conclusory explanation.

which is probably true of most disciplines and most writers.<sup>41</sup> The questionable quality of particular debates does not impeach the discipline, and perhaps not even the author.

6. *The Inside/Outside Perspectives*.—A distinction is sometimes drawn between persons outside the bioethics discipline who comment on its qualities and those inside it—the people doing bioethics.<sup>42</sup> There are some puzzles here: does one become an insider by pursuing a critique of the inside? If one wants to change a discipline, should one join it and seek change from within, or stay outside and mount an attack? How could we tell the difference? Perhaps the criterion is that one remains outside, regardless of the critique, as long as one insists that she is not a bioethicist. If the critique of bioethics is within bioethics, then how infirm can bioethics be if it contains within itself the appropriate counter-considerations? Yet if the critique is itself badly flawed, then locating it within bioethics compromises the disciplines' status by adding a misguided sub-discipline. I have nothing further to say on this because, though amusing for its self-referential paradox, it is not to the point here.

7. *Does the "Technological Imperative" Make Catching Up Impossible?*—The point here is simple. It is hard to catch up with a target moving away from you at a greater velocity than yours. Worse, the target technology is not only going to keep moving, it will inevitably accelerate.

Here the difficulty becomes apparent. Unless people see technology literally as a sentient entity holding humanity in its tractor beam, they will instead believe that technological developments are a result of people's actions and thus can be controlled. However, "technological imperative" is not that nonsensical a concept. It refers to matters of individual and social psychology. If enough people share an ethic of "progress" (in certain senses), believe humanity can and should strive to acquire knowledge and to control at least some aspects of nature, want labor-saving tools, and are willing to make heavy financial and emotional investments in science and technology, then resistance to all technological development in a human population of more than five billion is futile.

The right question of course is not about halting all technology, as the Unabomber seemed to prefer (even as he used technology to blow people up), but halting or heavily regulating particular technologies. That too is difficult. It is true that we have used atomic weapons in war only once, and that many are trying to stamp out the development and use of pathogenic agents and poison gas, but one cannot confidently say that these areas will continue to represent success stories. "Catching up," by sharply attenuating the technological imperative thus requires a striking and unlikely change in human behavior. Of course, this does not bar the possibility that specific areas of technological development can be controlled.

In any case, as I said earlier, catching up is not simply about our trying to

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41. To the extent that the mistaken criticisms of the foundations of bioethics are part of the corpus of bioethics, one might well mount a case that bioethics is bruised, but not broke.

42. See K. Danner Clouser & Loretta M. Kopelman, *Philosophical Critique of Bioethics: Introduction to the Issue*, 15 J. MED. & PHIL. 121 (1990).

accelerate our thinking or regulating. If it means anything, it means working harder at unearthing the most important issues governing an expanding set of technological capabilities. In some cases, it may refer to the even more basic accomplishment of recognizing that there is an issue and starting to think about it. One might view any of this as catching up, but there will be no checkered flag to mark success or failure.

## I. THE ASCENT OF TECHNOLOGY AND THE DECLINE OF HUMANITY: ON THE DISTINCTIVENESS OF BIOETHICS

### A. *The Descent*

One of the central critiques of applied life science technologies<sup>43</sup> is easy to state, but hard to interpret and confirm. The complaint is that technological power over fundamental life processes results in a decline in the moral qualities of human interaction.<sup>44</sup> In particular, technological progress causes human regress by reducing people to objects.<sup>45</sup>

But what is this human decline about? It is not about a reversion to lower primatehood and a return to our home in the trees. Perhaps it is more like our becoming drones in the Borg hive.<sup>46</sup> The plunge toward objecthood can only refer to changes in our attitudes about what personhood and human interaction should entail and thus to changes in how we come to treat each other. Fears of such retrograde slides are reflected in bioethics commentaries denouncing technology-assisted objectification, especially in the fields of reproduction, genetics, and performance enhancement, though transplantation and control of dying are not far behind.<sup>47</sup> Here, biotechnology is not alone; assessments of other

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43. I make no effort to define “technology” precisely. One definition that I have quoted elsewhere is this: “Following the Dutch philosopher Piet de Bruin, I define technology as the control of nature by way of combining its forces according to a design conceived of by human understanding. The resulting combination is a new work of nature that can be used as a means to realize a specific end.” T. Maarten T. Coolen, *Philosophical Anthropology and the Problem of Responsibility in Technology*, in *TECHNOLOGY AND RESPONSIBILITY* 43-44 (Paul T. Durbin ed., 1987). The apparent oxymoron “new work of nature” calls attention to the difficulty of defining “natural” and “artifactual” and distinguishing one from the other.

44. By “technological power” I mean both what can be done and the very idea that such power is possible and is likely to be developed sooner or later if there are no preventive efforts.

45. I leave aside whether and to what extent this applies beyond life science technologies.

46. In *Star Trek: The Next Generation* (Twentieth Century Fox Television Broadcast), the Borg is a huge collective unit made up of formerly separate individuals. They were “assimilated” into the collective mind, although enough individuation remains, to allow Borg “drones” to be restored to independent personhood. I refer, of course, to Seven of Nine, in the *Voyager* series.

47. See Martha C. Nussbaum, *Objectification*, 24 PHIL. & PUB. AFF. 249, 262 n.20 (1995) (a critical analysis of objectification arguments); see also Michael H. Shapiro, *Illicit Reasons and Means for Reproduction: On Excessive Choice and Categorical and Technological Imperatives*, 47 HASTINGS L.J. 1081 (1996) (a critique of objectification arguments against the use of

technologies often present this same view of human devolution.<sup>48</sup>

The indictment of applied biology is often accompanied by claims that bioethics is infirm because it has failed to stop or even slow the onslaught of personhood-impairing technological advances. It has failed because its intellectual structure is impoverished or beholden to the wrong groups or values and so hastens our decline.<sup>49</sup> This is so whether bioethics is viewed as a scholarly discipline, a body of law and legal practices, a set of customs and clinical practices, a set of attitudes and perspectives held by various groups, or any or all of these.<sup>50</sup> Whatever it is, it is said to lack relevant perspectives, embrace the wrong values and value priorities, use the wrong paradigms and models and other modes of thought, and to be patriarchal and too oriented toward establishment culture.

The task here is to expose the vulnerabilities of these attacks.<sup>51</sup> In this “critique of the critique” of biological technology and bioethics, I will complain, among other things, about how debates on the uses of life science technologies are framed and pursued in confused, confusing, and often misleading terms.<sup>52</sup>

### *B. Is Bioethics Distinctive and on What Notion of “Distinctiveness”? : A Definitional Inquiry*

One way of entering this meta-critique may seem roundabout but is not. To critique the critique of bioethics requires some account of what bioethics is. I will try to show why bioethical problems are exceptionally troublesome, and this requires identifying what causes the trouble.

The explanation lies largely in a showing of how practices which radically rearrange life processes to suit specific wants generate conceptual and normative monsters:<sup>53</sup> persons, entities, relationships, situations, and behaviors that escape

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reproductive technologies).

48. See generally Bruce Mazlish, *The Fourth Discontinuity*, 8 TECH. & CULTURE 1 (1967); BRUCE MAZLISH, THE FOURTH DISCONTINUITY: THE CO-EVOLUTION OF HUMANS AND MACHINES (1993).

49. See Susan M. Wolf, *Shifting Paradigms in Bioethics and Health Law: The Rise of a New Pragmatism*, 20 AM. J.L. & MED. 395, 397 (1994). See generally *Is Bioethics ‘broke’?—Critiques of Bioethics*, in MICHAEL H. SHAPIRO ET AL., BIOETHICS AND LAW: CASES, MATERIALS AND PROBLEMS (2d ed. Part I forthcoming 2001).

50. On defining bioethics as a field, see also Callahan, *supra* note 15, at 250-51 (distinguishing sub-branches of bioethics: theoretical, clinical, regulatory and policy, and cultural).

51. For attacks on technology generally, see JACQUES ELLUL, THE TECHNOLOGICAL SOCIETY (1964); VICTOR FERKISS, THE FUTURE OF TECHNOLOGICAL CIVILIZATION (1974).

52. These infirmities do not warrant an inference that foundations, paradigms, or perspectives are fatally flawed. My complaints are thus not inconsistent with my defense of bioethics. The disagreements here represent value differences or what I think are insufficiently rigorous or otherwise faulty argument structures. This is not fatal to the discipline as a whole. It is not even necessarily fatal to the specific work under attack.

53. See David Bloor, *Polyhedra and the Abominations of Leviticus: Cognitive Styles in*

the major abstractions we use to describe, explain, and evaluate human actions and circumstances.<sup>54</sup> Of course, we encounter daily anomalies that do not fit nicely into our conceptual bins, but the failures recited here are special not only because they fit so poorly, but because they deal with foundational matters: whether we will come into or continue our existence, in what form, and under what constraints and circumstances.

Why the emphasis on an arid inquiry into classification? Classification is at the core of human thinking, but this broad proposition is not of special concern here. What does concern us is that there is a major difference between problems that challenge our principal conceptual implements and those that do not. To be sure, this also involves a classification problem; the issues we face are not neatly distinguishable on the basis of the gravity of their challenge to our main concepts. Some classification problems seem to remove the flooring, others merely cause light tremors, still others are resolved without much notice on our part, and some elude these classifications also.

The big ticket challenges, however, do seem different from the usual sort of classification problems that we encounter, whether in legal disputes or ordinary daily living. Our conceptual system is not assaulted because we cannot identify a clear boundary between negligence and due care, or between due and undue process. Nor is everyday language fatally flawed because there is no clear border between being tall and not being tall. Few would claim that we should abandon all concepts and distinctions because some of their applications are unclear, indeterminate, or change with time. Even simple conceptual vagueness, however, can lead to serious normative/conceptual problems as the world changes. Six-footers used to be giants and still are among some groups, but among other groups—think of the N.B.A.—six feet is pretty short. Do persons projected to be no more than six feet tall need growth hormone? Do early embryos from short people require genetic enhancement?

Similarly, as we saw, it is no garden-variety puzzle to be unable to identify a single natural mother when a fertilized ovum from one woman is gestated by another woman, who of course has no genetic connection to it. Here, the very structure of elemental notions like “mother” is in question. The concept itself has been fragmented as a result of our reconfiguration of the reproductive process.<sup>55</sup>

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*Mathematics*, in ESSAYS IN THE SOCIOLOGY OF PERCEPTION 191, 197-98 (Mary Douglas ed., 1982) (relying on IMRÉ LAKATOS, PROOFS AND REFUTATIONS: THE LOGIC OF MATHEMATICAL DISCOVERY (1976) (discussing mathematical “monsters”)).

54. It should be clear from this that I do not use “bioethics” to refer to all moral and legal problems within the realms of medical ethics, health care, and biology. Cf. Ezekiel J. Emanuel, *Where Civic Republicanism and Deliberative Democracy Meet*, HASTINGS CENTER REP., Nov.-Dec. 1996, at 12 (suggesting the inclusion of matters of health care coverage within medical ethics, and asking, “Is there a relationship between defects in our medical ethics and the reason the United States has repeatedly failed to enact universal health coverage?”).

55. Cf. JONSEN & TOULMIN, *supra* note 7, at 320-21.

After a sex change, the everyday presuppositions built into the term “marriage” (notably,

This divide-conquer-and-confuse aspect of some biological technologies leads us to other characteristics of bioethical problems. Among the more notable are the reinforcement of the idea of the determinate, predictable, controllable, algorithmic person; the introduction of new purposes for our old life processes, as in producing fetuses to provide transplantable tissue rather than to reproduce; providing opportunities to further existing purposes with greater precision, as in controlling behavior with psychotropic drugs; and, more generally, substantially increasing our control over life processes, enabling greater predictability of traits and behavior. The very existence of such choice over matters not previously under our control is itself something of a conceptual anomaly. Think, for example, of being able to determine the entire genome of a person-to-be through cloning, or of being able to heavily influence particular traits. If we can "construct" a person through technological alteration of her physiological system or her germ line, what sort of being should we construct?<sup>56</sup> What new or strengthened purposes *ought* to be installed for life functions? What purposes for reproduction should be added or extended? The possibility of bone marrow transplantation suggests having babies—not just fetuses—to provide compatible tissue for transplantation. The prospect of cloning may inspire reproductive acts resting on the (mistaken) view that clones are locked into some common fate shared by all who have their defining genome. A given act of cloning may thus reflect the novel purpose, not simply of having children, but of perpetuating a line of identical persons raised to pursue some sharply bounded set of tasks requiring that their talents be matched to their assigned roles in life. Here, then, biological technology restructures reproductive processes in a way that generates anomalous lineage relationships, reinforces the images of persons as determinate entities, and provides us with additional reasons, possibly mistaken or objectionable, for using procreational mechanisms.

So, the arguably distinctive features of classic bioethical problems are that they involve, at the most abstract level, the directed revision of life processes and what this entails: the idea of the determinate person; the substitution of new purposes in using human capacities; and the general expansion of choice in constructing, controlling, and predicting life processes, in partial displacement of the natural randomness of life.

These distinctive features of bioethics are not fully independent. The core idea is still the reordering of life processes into unclassified forms, giving us relationships (e.g., gestational mothers and "their" children and the children's "genetic parents"); entities (such as cryopreserved embryos); and powers (over our own fundamental structures, individually and collectively) that we often do

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the assumption that the partners to a marriage contract have permanent and definite genders) are so deeply undercut that this term, as it stands, no longer covers all the relevant practical problems. We must now ask ourselves what its moral force is, in future, to be.

*Id.*

56. See generally JONATHAN GLOVER, WHAT SORT OF PEOPLE SHOULD THERE BE? (1984) (examining the moral dilemmas involved in controlling human traits).

not know how to deal with. Some believe that this transforms our vision of persons as free into an anti-vision of persons as machine-like or lower-animal-like—predictable, explainable, and controllable.

As we saw, all these features of bioethics create an ever-increasing range of choices over matters we traditionally regarded as fixed or as changing only very slowly over time. This expanded set of choices will not be universally viewed as a benefit simply because it promotes autonomy-as-opportunity.<sup>57</sup> In matters of creating and maintaining life, the very existence of choice over what formerly was given offends many, conveying images of the reduction of persons to a set of manufactured modules.

I do not argue that these considerations distinguish everything in or out of the realm of bioethics, but they suffice here. They all do a number on our conceptual system, making it especially difficult to know what to make of a given problem,<sup>58</sup> and there is only so much that moral, legal, and policy analysis can do. This is the gist of the response to the complaint that bioethics, as it stands, is inadequate to the task before it—perhaps inadequate even to define the task. But to say this reflects confusion about what the task could be.

## II. IS BIOETHICS “BROKE?”: ELABORATING ON ITS DISSING

### A. *Preface*

Critiques of bioethics have centered on several purported defects of the discipline. Some complaints are about its intellectual structure—particularly the dominance of a given set of perspectives to the exclusion or devaluation of others. Both scholarly works and legal outcomes may exhibit this dominance, enhanced by mutual interaction. Other complaints, not entirely independent, deal with the internal processes of the discipline. I emphasize the scholarship and law here, but do not entirely ignore the latter.

Here, then, are some of the specific complaints.<sup>59</sup> The first three are closely

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57. See Shapiro, *supra* note 32, at 349-50.

58. As part of the defining aura of bioethics, one might also invoke the idea of “forbidden knowledge” of the very springs of life and behavior. Whether we think that some form of knowledge should be avoided is partially a function of the hostility we have toward the technology that rests upon the knowledge. There may also be a general demoralization effect in knowing, say, of the physical foundations of our thought and conduct or of our evolutionary antecedents. Still, the idea that some sorts of knowledge should not be sought or possessed, while hardly limited to life sciences, seems to have a particular application to them, and is, to some extent, independent of the actual uses of the technologies involved. Some are disturbed, for example, by claims that human emotion and thought are strongly linked to workings of neurotransmitters. For a more general account of issues in limiting scientific research, see generally General Topic, *Forbidden Knowledge*, 79 MONIST 183 (1996).

59. I do not claim to be exhaustive here, and concede that the account reflects my own perspectives. There is no help for this: we can only see from where we stand, while trying to imagine how it is to stand elsewhere—a point well made by Nagel. See NAGEL, *supra* note 11, at

linked: excessive focus on the use of formal rules, principles, and standards; an obsession with autonomy and rights, to the exclusion of other frameworks of thought; and overlegalization.<sup>60</sup> Other major changes include insufficient attention to community, responsibility, and duty; and undervaluing or ignoring circumstances that threaten the very possibility autonomy, individuality, and appropriate recognition of rights.

In turn, these circumstances are said to include oppression based on disfavored traits such as race, ethnicity, gender, religion, sexual preference, disability, and stage of life; and oppression (including coercion, exploitation, and undue influence) within professional relationships in which powerful elites exercise authority. Here, the concern arises from the structure of crystallized relationships—physician and patient; researcher and subject; lawyer and client; agent and client (as in brokerage for surrogacy relationships); one contracting party and another (surrogacy is again an example, and physician-patient relationships have a contractual aspect); and, more grandly, institutions and their personnel on the one hand (government, hospitals, HMOs, prisons, mental health facilities, etc.), and persons, families or other groups, on the other. Conflicts of interest are of special concern here. Autonomy, individuality, and rights are also weakened by oppression stemming from one's status within important personal relationships, such as husband and wife or other couplings; parent and child; kinship and cultural groups; and the various communities to which one belongs. Again, conflicts of interest require particular attention.

Such failures are presumably why we are told that bioethics needs some “paradigm shifts.” (As I note later, pragmatists might complain about overemphasizing “paradigms” in the first place.)

#### *B. Kinds of Critiques: Outcomes and Bottom-line Disagreements; Philosophical/Value Disagreements; Ideological Differences; and Mistakes*

1. *Outcome and Process.*—Before commenting on the charges just mentioned, we must ask how to characterize the principal critiques of bioethics, or even whether they are rightly called critiques of *bioethics* as opposed to commentaries or complaints about something else.

One can plausibly criticize a discipline as conceptually and normatively impoverished because it fails to consider all material matters; that it proceeds illogically, incoherently, or otherwise carelessly or irrationally; that it is beset by conflicts of interest and imbalances of power; that it is biased, rigidly constrained by ideology, afflicted with false consciousness; and so on.

It is less plausible, however, to complain because one simply disagrees with an outcome, without express regard to the approach used; or because (unthinkingly) the critic and the criticized assign different meanings to the same

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5 (“[O]bjectivity allows us to transcend our particular viewpoint and develop an expanded consciousness that takes in the world more fully.”).

60. A rights orientation is often viewed as law-inspired, perhaps even when dealing with moral rights.

terms or concepts used in the decision making process. For example, rights-talk by one party may be at a different level of generality from that used by another; or a claim about *prima facie* rights might be taken as an absolute claim by another; or a claim about non-interference rights might be conflated with a claim about rights to affirmative assistance.

It is particularly important to see both the separations and the connections between outcomes and the processes that led to them. Process and outcome are not the same, but they are not completely distinct either. “Outcome” can be described in ways that reflects aspects of its origins and “process” can be formulated to embrace certain outcomes.<sup>61</sup>

Now, at some point in seemingly identical processes, persons reaching different outcomes must diverge on something, including identification or use of criteria. This can happen at any point. One must thus determine at what stage or level of abstraction or particularly a process is being attacked, whatever the conclusion. Something may well have gone wrong, in the critic’s eyes, whether at the end or earlier in the process. But, the critic may mistakenly look only to the outcome to determine that the field is radically infirm.

Consider this exchange: “No, I reject physician-assisted suicide because it is too likely that life will be lost when it should not be.” “Wrong, it is not that likely.” If this is a disagreement on the rough probability of erroneous suicide is, neither side can, without more, rightly complain of the quality of the other side’s moral analysis, unless their moral frameworks have distorted their empirical lenses. On the other hand, if the disagreement is about whether a certain error rate is too great to bear, or about what even constitutes an error, it is likely to be a moral disagreement. It would be inappropriate, however, for the one side to say that the other side’s position is radically infirm solely because, using the same basic moral architecture, it arrives at a different moral conclusion.

Of course, the differences may start at the beginning. The disputants may strongly disagree on what sorts of lives should or should not be lost, a disagreement more likely to rest on value differences than on factual disputes. Or they may agree on certain threshold matters (e.g., on which values are the dominant ones) and then disagree on either factual issues (e.g., how do physicians actually behave in end-of-life situations?) or particular value issues (say, about whether limiting a patient’s suffering morally edges out the risk that she will die weeks or even months too soon). These outcome differences are hardly trivial, but it vastly overstates the case to say that the one side or the other is invoking the wrong paradigms or is indifferent to various legitimate interests.

So, outcome disagreement does not warrant mutual accusations that the processes behind the conclusions must have broken down because of design defects or flawed reasoning. There are kinds and degrees of breakdown and ultimate failure. Additionally, there may be irremediable disagreement on what even constitutes failure of any sort. Failure has a complex structure and taxonomy. An analogy, for example, may yield different results for different

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61. “Process,” in this context, includes the substantive criteria used to describe and to evaluate.

analogizers. The analogy is not broken down or useless because of this.

Consider, for example, the idea of a commercial transaction as applied to human reproduction. A surrogacy arrangement can be as much a commercial exchange as the purchase of a clothes dryer. But saying this and abruptly ending the analysis is an immense descriptive and normative/conceptual error. Some indeed use the comparison to attack surrogacy as causing or constituting human commodification (the commercial version of objectification) by stressing the similarities between the two transactions—and then stopping without considering their differences. It is hard to see how the analysis could possibly be complete without doing both; there is no other rational way to deal with a purported parallelism. Moreover, the analogy is mishandled if one does not see that what even counts as “similarity” or “difference” may be contested. If a commentator or a discipline characteristically fail to confront both similarities and differences and the difficulties in recognizing them as such, then its decision making processes are indeed infirm. Making comparisons with blinders on may reflect bias and pre-judgment, conflicts of interest, lack of time for reflection, or lack of acuity. Disagreement about the results of the comparison, of course, does not nullify its worth; one’s final judgment, however, is far better informed.

Moreover, an analogy may be useful in some contexts and not in others. For example, some nontrivial constitutional value probably applies to most forms of assisted sexual reproduction—artificial insemination (“AI”), IVF, etc.: with respect to sexual union in the general biological sense, they are identical. The social relationships involved may vary, but few doubt the status of these processes as human reproduction entitled to some constitutional protection.

Some commentators, however, think that human asexual reproduction is so radically different that all constitutional bets are off: it is outside the Fourteenth Amendment’s procreational autonomy ballpark. Its distance from paradigmatic sexual reproduction cannot be measured because the notion of “distance” does not readily apply. What is contested here is the very status of sexual recombination as a defining characteristic of human reproduction; the birth of a child is, for some, not enough to trigger constitutional protections of procreation.

For such observers then, comparison to a paradigm may work pretty well for AI, IVF, and even posthumous reproduction, but not for human cloning.<sup>62</sup> The paradigm does not help establish anything one way or the other, or so one might argue. The asexual nature of cloning drives some critics to say, in effect, that it makes no sense to talk of the linear distance between sexual and asexual reproduction: they are utterly distinct and rival processes that should not bear the same designation—“procreation.”

The upshot is that use of analogy or comparison to a paradigm need not be universally serviceable; the processes are not completely worthless merely because they sometimes fail. Much the same applies to entire disciplines: if the discipline reaches a decision different from yours, it will take a lot more beyond this bare fact to establish a failure of process and an impeachment of its

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62. See Michael H. Shapiro, *I Want a Girl (Boy) Just Like the Girl (Boy) That Married Dear Old Dad (Mom)*, 9 S. CAL. INTERDISC. L.J. (forthcoming 1999).

practitioners.

2. *Warring Philosophical Movements or Dispositions.*—To explain outcome disagreement as the result of differing processes (understood as modes of reasoning and evaluation) may understate the gulf separating antagonists. One movement may claim to be at war philosophically with how another proceeds, as when a pragmatist complains of fixations on abstractions—not particular abstractions but abstractions generally—as opposed to the particularized circumstances and context of a case. Another standard example is the contrast between consequentialism (utilitarianism is its best known theory) and nonconsequentialism. Even if the distinction is somewhat overdrawn<sup>63</sup> (and for some it is not exhaustive) the two arenas are quite different.

3. *Disagreements over the Status of Particular Values, Such as Autonomy, Fairness, Justice, Equality, Privacy, and Utility.*—To invoke autonomy without attending to countervailing considerations<sup>64</sup> is a moral error. As I have said elsewhere, autonomy is not everything. But if one is faulted for relying on autonomy at all by others who think that it is largely immaterial, this deep moral disagreement is, again, not well characterized as resting on mistakes or errors on either side. Much the same can be said of persons who differ on the placement of autonomy in the hierarchy of values.

4. *Disagreements About Matters of Fact—or Are They?*—Disagreement on material facts also accounts for discord on how to evaluate and respond to actions and situations. However, apparent strife over facts often masks serious moral/philosophical disagreement. Few scholars need to be reminded about the role that cognitive perspectives, frameworks (normative and otherwise), schemas, scripts, and the like play in our perceptions. A purported statement of fact may represent a partial or overinclusive vision generated by one's attitudes and values. In this sense, the factual claim is normatively ambiguous.<sup>65</sup>

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63. See Samuel Freeman, *Utilitarianism, Deontology, and the Priority of Right*, 23 PHIL. & PUB. AFF. 313, 348 (1994) (observing that "the teleology/deontology distinction does not mark a contrast between moral conceptions that take consequences into account and those that do not. No significant position has ever held consequences do not matter in ascertaining what is right to do.").

64. The primary meaning of "countervailing considerations" concerns jeopardizing or injuring interests that might be harmed by an exercise of autonomy (including at least some harms to the actor, under most political/moral philosophies). These considerations can be taken to include the presuppositions or preconditions of autonomy: competence; authenticity; voluntariness and absence of coercion and undue influence; (possibly) deliberation; and (possibly) no false consciousness. (These elements are not of equal import, either as a matter of theory or in specific situations, but there is no reason to refine the specification here.) If any of these presuppositions do not hold, a variety of interests are imperiled, including that of the actor. For clarity, referring to the presuppositions as a particular subset of countervailing considerations seems better.

65. Simple-sounding statements such as "Doing *x* poses significant risks that have been scientifically validated" are classic examples. What risks are "significant" rests in part on value judgments; what is "scientifically validated" rests on value judgments about what risks of factual error we are willing to tolerate. For example, a requirement that a randomized clinical trial display a result that is no more than five percent likely to be a matter of chance as opposed to therapeutic

5. *Semantic Confusion.*—In any dispute, there may be misunderstanding of the meanings of basic terms. “X has a right to advocate action Z” can be taken as the statement of a simple absolute, a defeasible *prima facie* statement, or a bottom-line conclusion taken after considering all countervailing considerations (e.g., the risk of a riot or other unlawful conduct). Perhaps some complaints about excessive attention to rights take the claims of right in an absolute or bottom-line sense when this is not intended. The moral premises underlying these different kinds of rights claims can be quite different.

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The claim that bioethics is badly in need of repair is thus no simple matter to (dis)confirm. There is repair and there is repair. A leaky faucet that runs dirty water because the household pipes are old is one thing; a poisoned reservoir is something else. From my viewpoint, if bioethics is in some disarray (I have strongly criticized the anti-technology viewpoint),<sup>66</sup> it is not because the discipline as a whole has missed major points, needs paradigm replacements, or is impermissibly indifferent to relevant moral, political, and factual considerations. It is because some of its practitioners hold value-orderings different from mine that lead them to downgrade considerations I find compelling and in turn lead them to present what I see as loose and incomplete arguments. At that level of abstraction, my own critique of bioethics is in some ways the reverse of what now appears to be the standard critique, which complains of immoderate attention to abstractions, especially autonomy, and to legal rights and processes.<sup>67</sup> However, my critique does not suggest that the field is now oblivious to abstractions and to law; I do not mean to make the same sort of all-or-nothing error I am complaining that others make.

The critique of bioethics that I am opposing here in some ways parallels better-known critiques of Western culture generally: complaints about excessive attention to particular values (primarily autonomy), identifiable rules, principles and standards, and so on. Fortunately, I cannot presently relate what I say here

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efficacy is not based on some universal constant that defines scientific validity. See Brock, *supra* note 4, at 221.

It is not that the common intuitive distinction between moral considerations, such as promise-keeping, and nonmoral considerations, such as financial costs, is mistaken. The mistake is in thinking that moral judgments can avoid weighing the two when they come into conflict; when that occurs, the financial cost becomes a morally relevant consideration in the moral judgment about whether the promise ought to be kept.

*Id.*

66. See, e.g., Shapiro, *supra* note 47; Michael H. Shapiro, *How (Not) to Think About Surrogacy and Other Reproductive Innovations*, 28 U.S.F. L. REV. 647, 664-67 (1994).

67. Cf. Stephen Darwall et al., *Toward Fin de siècle Ethics: Some Trends*, in MORAL DISCOURSE AND PRACTICE: SOME PHILOSOPHICAL APPROACHES 3, 32 (Stephen Darwall et al. eds., 1997) (observing that “debate has now extended even to the metaphilosopical level, as philosophers have asked with increasing force and urgency whether, or in what ways, theorizing is appropriate to morality.”).

to such global commentaries.<sup>68</sup>

### C. Excessive Focus Within Bioethics on the Application of Rules, Principles, and Standards; Formalism

#### 1. Abstractions and Formalism.—

a. *Generalizations in general.*—If the complaint is that bioethics or other disciplines rely to any significant extent on “abstractions”—in particular, to rules, principles, and standards—it is absurd, and I doubt anyone really thinks otherwise, despite some loose talk. Distinctively human thought and decision making are generally impossible without abstractions. This holds whether the abstractions are formed and used nonconsciously, and whether we can even articulately state them. Pragmatists, as I understand them, do not deny any of this.

What, then, is the claim of over-attention to generalities all about? The push is for lawyers, judges, legislators, agencies, scientists, physicians, and commentators to pay more attention to particular individuating circumstances and less attention to the logic of the relevant abstractions. Of course, one must necessarily deal with both. Whether some level of abstract discourse is over or under-done may rest on contested moral/conceptual issues that are familiar in law, philosophy, and public policy. When one claims, for example, that “the rule should be bent to do equity in particular situations,” one is likely to think that the rule itself should be clearly (re)formulated to cover the contested situation. To say, then, that one is overdoing the abstractions and underdoing the facts is at bottom to call for a review of what particular circumstances are material in light of selected abstractions, perhaps in the form of rules, principles or standards. There may, of course, be disputes on the interpretation of the abstractions and on the very choice of abstractions, but the point remains that the abstract statement that one is being too abstract *itself* rests on the abstractions selected and interpreted. Its bare articulation may simply be a loose way to state a moral preference. Depending on the circumstances, abstractions can even remain unmentioned. Everyday characterizations of right, wrong, good and bad do not generally require a display of theoretical underpinnings, but these abstractions remain part of the hidden infrastructure of moral justification.

This account may not dispel reservations about “the rarified air of conceptual analysis,” the results of which may or may not bear on “provid[ing] solutions to practical moral problems.”<sup>69</sup> However, there is little to support a claim that bioethics is lost in the clouds or the Platonic realm of Forms. Decisions are made despite uncertainties at every level of abstraction, and it is entirely possible to “compartmentalize” one’s decision process at particular levels, insulating it from

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68. Cf. Constance Holden, *Reason Under Fire*, 268 SCIENCE 1853 (1995) (quoting Sandra Harding, “who thinks Newton’s *Principles of Mechanics* reflects patriarchal, exploitative Western thinking, and therefore might as well be called ‘Newton’s Rape Manual’”).

69. Cf. Holmes, *supra* note 15, at 144.

other levels.<sup>70</sup> Sometimes it is the Forms that require attention—what they are, what they mean. Sometimes they are rightly taken as given, and it is the particular circumstances that require attention. For example, in *Davis v. Davis*,<sup>71</sup> the court, after identifying the governing abstraction of procreational autonomy, held that Mr. Davis should not be compelled to risk becoming a genetic father because the burden on him would be greater than that imposed on his former spouse.<sup>72</sup> The court therefore disallowed the implantation of the cryopreserved embryos he shared with his former wife, who wished to see them implanted in other women.<sup>73</sup> Presumably, if the issue again arises, the abstraction can be taken as given and everyone can concentrate on the particulars. This is, in fact, often desirable: we cannot give our full attention to every level of discourse even for a single pressing decision. However, for full validation, at some point every level requires attention to every other level, or justification for particular decisions will be incomplete.<sup>74</sup>

b. *Who has missed what?; examples.*—Here is a rule: “If you file your complaint sounding in tort more than a year after the injury was inflicted, your claim is time-barred.” There is no provision for tolling. It is a flat rule that admits no individuating circumstances—even the fraudulent conduct of the physician or other tortfeasor.

In some cases, this rule seems unfair; potential plaintiffs may have many plausible excuses—e.g., inability to find a lawyer, fraudulent concealment, and so on. However, the limitations rule says, “too bad.” The legislature has decided that attention to individuating circumstances is inappropriate here because it is inefficient and excessively burdens physicians as well as others. The argument against this is not about whether we use abstractions, but about using the wrong ones or using sound ones inappropriately. Some may urge that it is too hamfisted to rely on “efficiency” and “excessive burdens” because it bars just claims against wrongdoers.

So, the competing fairness and efficiency arguments from patients and physicians reflect, in part, value disputes, and some of them rest on empirical

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70. Cf. *id.* at 151 (describing the view that bioethical issues “can be analyzed in a way that is largely neutral with regard to such commitments [to normative and metaethical theory]”).

71. 842 S.W.2d 588 (Tenn. 1992), cert. denied, 507 U.S. 911 (1993).

72. See *id.* at 598-604.

73. Mr. Davis had a special fear of being a father with incomplete access to his children because as a child he suffered from parental absence. See *id.* at 603-04. The former Mrs. Davis had remarried and did not want to implant the embryos in herself. See *id.* at 590.

74. Cf. Holmes, *supra* note 15, at 145 (“Solutions to these [moral] problems may be thought to require the findings of any or all of the other three areas of philosophical ethics [metaethics or moral epistemology; normative ethics (i.e., concerning “the correct principles of rightness like utilitarianism or Kantianism”) and applied ethics].”). Holmes also characterizes the current views on G.E. Moore’s metaethical analyses (“[m]uch of twentieth-century ethics has departed from Moore in this belief that the question of metaethics (particularly with regard to the meaning of ethical concepts) must be answered before one can effectively tackle the questions of normative ethics.”). *Id.* at 146.

issues concerning physician and patient behavior under different rules. The argument at this stage is not that a rule (an abstraction) was applied—it is that the *wrong* rule was applied.

The complaint about using abstractions is thus a complaint that morally relevant individuating circumstances are being shorted by particular rule. The call for action, then, is not to quit the use of abstractions but to make them more responsive to the varieties of different situations. Sometimes particulars *should* be shorted, sometimes not; *that* is the dispute—what the very nature of the rule and its elements should be. Despite some hyperbolic remarks by philosophical and legal pragmatists, it is unconvincing to argue (using abstractions, of course!) that moral and legal reasoning *simply* require close attention to particular facts, circumstances, and situations. Oliver Wendell Holmes, Jr., did indeed say that “[g]eneral propositions do not decide concrete cases.”<sup>75</sup> But, neither do “particular” propositions; one needs both.

Now, for which bioethical issues or subdomains have bioethicists paid too much attention to abstractions? Or, better yet, when have they wrongly failed to formulate the proper abstractions—those that make outcomes depend on morally relevant particulars? For example, what issues in death and dying reveal this moral error? The physician-assisted suicide (“PAS”) debate? *Who has missed what issues?* The Oregon law does not *require* screening of PAS applicants for depression.<sup>76</sup> I believe this is an error because of the likelihood that depression will distort a person’s thinking generally, and her perception of her own settled preferences in particular. “Mood” and “thought” do not exist in disconnected universes.

No one has “missed an issue” here. Nearly everyone knows of the risks of depression-induced distortions of mind—“distortions” in the sense that one’s announced decisions may differ from one’s future settled preferences. Why not *require* psychiatric evaluation and treatment? As far as I know, psychiatrists do not have direct pipelines to The Truth, but they and their medicines have been shown to be reasonably effective (though even this is contested) in treating depression. Perhaps PAS supporters place too low a value on loss of life. Perhaps *I* place too low a value on the avoidance of suffering. Perhaps *I* overestimate the risks of abuse—or have an overly expansive view of what abuse is. Perhaps the others underestimate the risks and have an unduly narrow view of what constitutes abuse. Perhaps I am too fearful that institutionalized PAS will engender increasing impatience with disability and infirmity. Perhaps the others aren’t fearful enough. We seem to have different dispositions concerning what risks of error we should bear. Recall that the parties in *Bouvia v. Superior Court*<sup>77</sup> and *Thor v. Superior Court*<sup>78</sup> changed their minds about wanting to die. Ms. Bouvia is alive as of this writing, and Howard Andrews, the prisoner-patient in *Thor*, died of other causes.

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75. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

76. See *Death With Dignity Act*, ORE. REV. STAT. §§ 127.800-127.897 (Supp. 1998).

77. 225 Cal. Rptr. 297 (Cal. Ct. App. 1986).

78. 5 Cal. 4th 725 (1993).

Moral/factual disputes of this sort are not evidence of a field's "breakdown" or its failure to take into account critical concepts, interests and perspectives. As for missed issues: One could say, trivially, that if two persons disagree, *something* is being "missed"—not seen, not felt, or insufficiently appreciated; someone "does not get" *something*. Prolonged absence of consensus is not evidence of a field's fatal flaws, however. If anything, it is some evidence that consensus is unlikely to or *cannot* be achieved, given the major collisions of value and the absence of overarching moral algorithms that can settle the disputes.

Obviously, sometimes something *is* missed, or at least one can plausibly think so. But in many cases, even claims that are incomplete or confused should nevertheless be made for the illumination they bring. In the debate over PAS, for example, some critics of the practice insist that patient screening for clinical depression be mandatory. Their position is that the distortions of mood and thought entailed by such depression is incompatible with any rationally plausible autonomy ideal. Failure to require such screening undervalues autonomy and overvalues the goal of avoiding suffering in its various forms. Perhaps so. But one of the few discrete issues largely missed in the PAS debate is that severe, long-standing, refractory depression is arguably more of an indication *for* PAS than for blockading it. This point has long needed to be made and the obvious value tensions further analyzed. Yet that deficiency alone impeaches neither the debate nor bioethics as a field; the initial point about screening for depression, incomplete as it was, inevitably leads to the question of what to do about unmanageable mental conditions, and beyond that to PAS for incompetent patients.

This foreshadows a point already mentioned and to be expanded later. In many cases of value conflict, it is impossible in principle to achieve theoretical moral closure with whatever moral theory or theories we are armed, even if we achieve (transient?) consensus. This instability or indeterminacy is *built into* the conceptual and normative structures we use, from foundational levels on down. The disputes will no more be settled than all the digits of  $\pi$  will one day be identified.<sup>79</sup> This is not a nihilistic announcement:<sup>80</sup> such indeterminacy is very

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79. Cf. FRIEDRICH A. HAYEK, *Was Socialism a Mistake?*, in THE FATAL CONCEIT: THE ERRORS OF SOCIALISM 6, 8 (W.W. Bartley III ed., 1988).

Although I attack the *presumption* of reason on the part of socialists, my argument is in no way directed against reason properly used. By "reason properly used" I mean reason that recognises its own limitations and, itself taught by reason, faces the implications of the astonishing fact, revealed by economics and biology, that order generated without design can far outstrip plans men consciously contrive.

*Id.*

Cf. Holmes, *supra* note 15, at 144.

[M]uch of the analytically inspired work on bioethics has as little practical value for the answering of the basic moral questions of bioethics as Aristotle thought Plato's account of the good to have for conduct in general. This is not to disparage such ethics or to deny its intrinsic theoretical interest; it is only to suggest that more should not be

far from making these structures meaningless; indeed, it is logically linked to their very usefulness as abstractions.

Consider now an example in assisted reproduction. What have commentators failed to track in their literature? What have judges and lawmakers failed to grasp? What have bioethics practitioners generally overlooked? The legal system may have remained silent on various matters, but this does not entail unawareness, and may or may not be a sign of lack of courage. Who, anywhere in the field, has simply assumed that “whatever is, is right” and acted blindly to ratify the Patriarchal Establishment? The literature spills over with commentaries about objectification, commodification, exploitation, marginalization, dehumanization, and so on. Is *contesting* the claim that such feared processes will occur or that they are always to be regretted a sign of intellectual and moral collapse? Perhaps that side just doesn’t get it. On the other hand, some think that too much is made of bare opportunities for reproductive choice (they read it as “license”) and not enough of individual coercive or exploitative situations that compromise true autonomy. Perhaps they undervalue autonomy as opportunity for choice. Perhaps this side—or even both sides—don’t fully get it (whatever “it” might be).

Another example from a different arena is behavior control. In *Washington v. Harper*,<sup>81</sup> the U.S. Supreme Court, though purporting to recognize an important “liberty interest” in refusing antipsychotic drugs, upheld the state’s power to treat prisoners with such medications over their objection, if medically indicated—and *without regard to whether the prisoner’s refusal was competent*. Before that, some cases in the lower courts held precisely the opposite: competent objection was decisive.<sup>82</sup>

Once again, who is missing what? Where is the fatal flaw? Did the *Harper* Court overvalue the expertise and interests to be furthered by medical and correctional officials and undervalue autonomy? Are those who object to the *Harper* result overvaluing autonomy, and if so, what form of autonomy?

Now, I do not wish to over-defend *Harper*. It is very far from a paragon of right reason. One of its principal flaws is its underestimation of the gravity of the conflicts of interest involved in the situation: the psychiatrists at the diagnosis/treatment level are reviewed by peers who are affiliated with the institution; the review panel staff are members of the institution and have duties to further both institutional purposes and the interests of patients-prisoners.

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expected of it than it is capable of delivering.

*Id.*

I add here, as in the text, Holmes’ qualification to his “limited relevance of analytical ethics” argument: the careful workings of bioethical and related legal analyses may settle a given problem *for any given decisionmaker*.

80. On nihilism, see Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 3-5 (1984) (discussing several senses of “nihilism,” including, nihilism as “anything goes” and as a view that no consistent principles unify legal reasoning).

81. 494 U.S. 210 (1990).

82. See, e.g., *Keyhea v. Rushen*, 223 Cal. Rptr. 746, 754-55 (1986).

Although the Court did not cite the Hippocratic Oath in direct response to the conflict of interest charge, it may have thought that the Oath all but solved the problem, thus grossly overestimating the Oath's influence and even the extent to which it is taken by physicians.<sup>83</sup> Nevertheless, the issues were ventilated, even if judicially mishandled. In any case, the deficiencies of formal education are hardly unique to bioethics.

In a moral dispute, as I said, one side or another is (not) seeing or (not) feeling something—perhaps something big, perhaps just a sliver. At any stage of argument, including the penultimate steps, whatever drives one side toward result X and whatever drives the other side toward not-X, separate minds have not fully “met.” Perhaps individual minds barely met within themselves. This is so with all moral disagreement and does not establish terminal intellectual disarray among the warring parties. The “he doesn’t get it” rhetoric may thus be inappropriate in many cases.

Thus, if the objection concerns inattention to particular circumstances that may affect application of the abstractions, that is one thing: such failures may be irrational unless resource constraints require exclusion of further factual inquiry. Sometimes the more fundamental objection is to the use of the wrong abstractions—although in some cases, little is gained and something may be lost by substituting one set of abstractions for another. But neither of these is an objection to the use of abstractions.<sup>84</sup>

What is mainly at stake is identifying *which* abstractions should apply and *which* particulars are morally and legally material given these abstractions. The two inquiries are strongly linked in complex cyclical ways that are hard to

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83. The conflicts of interest were pointedly described in Justice Stevens' concurring and dissenting opinion. *See Harper*, 494 U.S. at 251-57 (Stevens J., concurring in part and dissenting in part). He noted that the panel members “were regular staff of the [Special Offender] Center, an institution for mentally disordered convicts.” *Id.* at 253. The Court mentioned the Oath in response to the argument that the treating physician might use psychotropic drugs for inappropriate purposes (apparently pure behavior control, without reference to the presence or absence of disorder). *See id.* at 223 n.8. Justice Stevens rightly derided the claim. *See id.* at 245 n.11. For a strong criticism of the way in which the *Harper* majority dealt with the conflict of interest issues, see CONFLICTS OF INTEREST, *supra* note 34, at 66-68.

84. *But see* Stanley Fish, *When Principles Get in the Way*, N.Y. TIMES, Dec. 26, 1996, at A27. Fish criticizes Herbert Wechsler for analyzing the segregation cases in light of principles of association, and complains about asking whether affirmative action is fair or is reverse racism. The right questions, he urges, are “whether the schools should be shut” and asks of affirmative action, “[d]oes it work and are there better ways of doing what needs to be done?” *Id.* But how does one think about whether the schools ought to be shut? What does it mean to ask whether affirmative action “works”? What are the criteria for “working”? Isn’t the “working” of affirmative action precisely what some people complain of and others endorse? There is no escape from principles and abstractions generally, and probably no escape from conceptions of fairness and freedom of association in particular. The proposed replacement of questions is worse than useless; it muddles things still more by removing one set of obscure abstractions (say, fairness) and installing an even more obscure set (“Does it work?”). This isn’t progress; quite the reverse.

specify. The hunt for material particulars entails reference to the moral or legal abstractions *by which materiality is determined*. However, it *also* requires closely inspecting the living circumstances, both to confirm what they are and to search for new insights—perhaps facts that vividly call attention to what might have been overlooked as material under the reigning abstractions. Attention to particular circumstances thus provides feedback into the system of abstractions, producing adjustments and even major revisions.<sup>85</sup>

Here I make another forward reference, this time to the discussion of “overlegalization” and the evils of adversary legal systems. Resorting to law and legal disputations is a prime mechanism for searching out new perspectives and frameworks of thought and to determine what lenses the protagonists are using to see and judge the world. That is at the core of what lawyers and judges *do*,<sup>86</sup> although they often do not do it well. Law and its abstractions, rightly viewed and practiced, do not strangle the intellect or distort our affect—they do precisely the opposite. This may often be done at an excessive price, and other social mechanisms for communication and decisionmaking may sometimes do it better.<sup>87</sup> Moreover, some professional personnel are ill-suited for the task. (Walk into a few courtrooms and listen to the lawyers and judges.) However, given the immense variations in our personal circumstances, deliberation and some degree of contention about abstractions and their applications are essential in determining how to formulate our rules.

c. *Formalism: More on abstractions and concretions.*—The appropriate complaint concerning abstractions, as I just argued, is about the rational skills used in selecting them and joining them with “concretions.” Certain flaws in pursuing this process are often faulted as “formalist.”<sup>88</sup> I cannot interpret that concept at length here, but something should be said about it because of complaints—perhaps not framed in terms of “formalism”—that bioethics is indeed burdened by its practice.

Three preliminaries: First, we need to discard the strange claim that we are all formalists because we insist that human thought generally, including moral and legal argumentation, must satisfy basic rules of logical inference. Everyone is constrained in this way, even those who go on about logic being just another belief system. If P implies Q and P is true, then Q is true; if Q is false, then P is false. No one is a “formalist” in some pejorative sense for acknowledging these claims. If that is all it takes to make one a formalist, everyone is a formalist. Insisting that a conclusion follow from its premises is not the mark of benighted bioethical (or other) analysis.

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85. See Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1 (1998) (discussing cognition in judicial problem-solving).

86. See generally Michael H. Shapiro, *Lawyers, Judges and Bioethics*, 5 S. CAL. INTERDISC. L.J. 113 (1997).

87. See generally STEPHEN P. GOLDBERG ET AL., DISPUTE RESOLUTION 149-53 (1985).

88. See generally Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) (arguing that the term “formalistic” should not be used as a blanket condemnation of a decision-making process).

Second, although there seems to be some precedent for it,<sup>89</sup> “formalism” is not used here to refer to having a rule-based legal system *at all* as opposed to something else such as lotteries or potentates’ whims. Those who use the term that way may in fact have in mind a rule-based legal system *of a certain sort*—one in which the rules do not sufficiently address or allow for a variety of material considerations, or at least are so interpreted. One might then assert that the law-makers are “formalist”—although “rigid” or even “morally impoverished” might be better descriptions.

Third, legal formalism has properties shared with any mode of applying rules, including the most preferred modes. To have a rule-governed system at all, which is a critical aspect of at least most versions of the rule of law, the rules must bind or channel independently of irrelevant variables. Thus, principles of equality, however difficult to apply, require rules providing that for given purposes persons are to be treated alike despite certain variations among them. Race, ethnicity, and gender are irrelevant under the rules conferring the right to vote. The same equality principles also require that for given purposes persons

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89. Cf. AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW: HALAKHIC PERSPECTIVES IN LAW—FORMALISM AND FLEXIBILITY IN JEWISH CIVIL LAW 3-4 (1991). The author states that

[T]he glory of the law—its sublime generality—is its very undoing. For in its passion for uniformity and stability, the law enlists the aid of formalism. Its indifference to persons may produce heartlessness; its impartiality, injustice; its rigid consistency, absurdity. How inadequate may the predictable rule appear! The primary meaning of formalism refers to the theory of the practice of rigid adherence to prescribed external forms.

*Id.* The author argues that

according to the Rabbis, legal formalism has been one of the plagues of mankind from its inception. The dispute between Cain and Abel was engendered by each one’s inordinate insistence upon his legal rights. [The author then quotes the Bible]: “One took the land and the other the movables. The former said, ‘The land you stand on is mine,’ while the latter retorted, ‘What you are wearing is mine.’ One said ‘Strip;’ the other retorted, ‘Fly. . . .’”

*Id.* at 21-22.

Both passages require reconstruction. The first is certainly on the mark in noting, in effect, that the governance of rules bears risks of error in two directions: in failing to follow the generality of the rule, one risks its very status as a rule, or as a rule of a particular sort; but in failing to take account of material matters bearing on the evaluation of the outcome, one risks unfairness and injustice. However, this does not mean *having a rule at all* should be dubbed “formalist.” One can have good rules and bad ones, and either sort can be interpreted in proper and improper ways. The second passage is about insisting on the enforcement or implementation of one’s rights. This may be “rigid,” “inflexible,” and “mean-spirited,” and perhaps, speaking very loosely, “formalistic,” but this usage does not reflect the usual jurisprudential meanings of “formalism.” Both Cain and Abel may have been jerks (who knows what *really* happened between them?), but not necessarily formalists. To say that in certain situations one should not stand on her rights is more a commentary on the status or application of the right or on the right-claimant’s character than on the merits of different interpretive theories.

are to be treated differently because of their variations. Incompetent persons cannot execute valid wills. Persons who do not know French ordinarily should not be hired to teach it. The supposed “inflexibility” or “rigidity” here is not an objection—it is virtually the whole point. Stolid fixity is chosen to constrain both government and individuals in the rule-specified ways. Assuming the substantive soundness of the rules at stake, equality, fairness and justice require that irrelevant particulars be ignored. Discretion to take these particulars into account is precisely what is to be avoided. Some rule-systems are *supposed* to be flat-footed or hamfisted. Indeed, in such cases the rule scheme and its applications are unlikely even to be called “formalist” (or “inflexible” or “rigid”) because of the pejorative aura of these terms. If formalists are more oriented toward abstractions than particulars, this is a predilection to be preferred in the appropriate contexts and with appropriate limitations; it takes all kinds.

To call a form, style, or instance of legal reasoning “formalist” is thus more than a description; it is at bottom a moral complaint, even if dressed as a matter of pure legal theory. The main substance of the complaint, at least for our purposes, is that formalist decision making rests on an impoverished set of morally relevant factors. That is, the characterization and evaluation of conduct, conditions, and processes within a given legal interpretive system regularly exclude morally relevant matters. Formalism can be ascribed to interpretation of law, to law making, and possibly to the particular law itself, although the former seems the best fit. (The two do not necessarily run in parallel. For example, a legislator constructing a rule sensitive to many particulars may nevertheless be a formalist in interpretation.) Similar remarks apply to characterizing moral reasoning as formalistic.

(i) *Formalism in legislative or administrative rule-making.*—Consider a legislatively created set of sentencing guidelines (ignoring constitutional limitations). The law provides for fixed sentences—not a range but a specific penalty, no more and no less, for all persons convicted of specified offenses. No facts are material except whether the elements of the offense have been satisfied and no defenses have been shown. There is, of course, always wiggle room—the prosecutor’s decision to prosecute and for what; what evidence to introduce; and the wide and largely unreviewable discretion lodged in juries and indeed in judges, whether they are engaged in fact-finding, law-applying, or even law-finding. However, in the main, the fixed penalties do not take account of, and forbid consideration of, any factors not specified in the definition of the offense. If killing your spouse is capital murder because you satisfied the elements of the crime and no defenses have been made, the fact that you were continually and severely battered by her cannot be used to avoid the death penalty. Of course, from a judge’s standpoint, her application of the sentencing guidelines is not rightly called “formalistic;” she is simply following the rules laid down by a legislature acting, from its moral perspective, to create a “formalist” system of legal rules.

Consider a parallel example: a rigid administrative rule that no one over sixty-five can receive a heart transplant. (Leave aside the question of whether this example violates existing federal or state laws.) Assume that the average five-year survival rate for those patients has been shown to be noticeably lower

than for recipients under sixty-five. Thus, there is greater organ "waste." On the other hand, to individuate the conditions of heart patients over sixty-five will be costly and may result in less or lower quality health care for others. Again, we have a formalist system.

(ii) *Formalism in common law rule-making.*—Courts are the most common targets of formalism charges. Their decisional law may fail to take account of proper individuating circumstances—perhaps even when one might think the legislature meant to be rigid, as in the above examples. Think of a judicially crafted informed consent rule based on physician custom: whatever it is that physicians characteristically disclose or withhold under specified circumstances determines what any given physician must or need not disclose to a patient, regardless of her particular needs or circumstances. How one describes the rule may vary: the rule is "informed consent is required," but it is applied in conformity with physician custom, not the needs of the reasonable patient. Or, the mode of "application" can be built into the rule: "informed consent requirements are satisfied only if the physician's disclosures conform to physician custom under parallel circumstances."<sup>90</sup>

So, if physicians customarily do not volunteer the five-year survival rate for liver transplantation to their patients, it need not be disclosed, though, if it is specifically requested, it may have to be. Calling the rule and its application "formalist" is a clumsy way of expressing criticism of the prevailing rule on its merits. Suppose, however, the rule is defended on the ground that the cost of highly individuated predictions for each patient is too great, and that insisting on it would raise prices for medical services generally and thus make the worst off even worse off. Perhaps the formalism is justified—or is "justified formalism" an oxymoron? Flat rules, one should recall, are *often* appropriate or even required. Perhaps neither they nor the courts that apply them should be called formalist. Anyone accused of a sufficiently serious crime has a right to a fair trial, no matter how clear her guilt appears to be. Would you prefer a more nuanced rule to save money when everyone knows the wretched person is guilty?

Formalism in adjudication or rule-making thus embodies a moral purblindness and inflexibility that both reflects and leads to overconfidence in one's understanding of abstractions. Formalism is, in at least in part, defined by a simplistic view of the content of these abstractions. It embodies a heroic belief that our categories can be easily and comfortably applied. There is a lack of situational focus—a failure to take account of enough relevant variables. Such inattention to morally material factors distorts the proper uses of abstractions and leads to wrongheaded outcomes. There is an insufficient degree of receptivity to new normative insights in the interpretation of major value concepts and an willingness to consider revising or replacing existing rules, principles and standards.<sup>91</sup> Legal segregation of the races in public facilities and institutions is

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90. The "reasonable patient standard" was adopted in *Cobbs v. Grant*, 8 Cal. 3d 229 (1972).

91. It remains difficult, however, to state whether any given interpretive path is "formalistic." One can mine the standard example of the battery-powered tricycle in a park governed by a rule forbidding the operation of motor vehicles within it. Is it formalistic to rest

almost always wrong, but in a prison race riot it would be crazy not to separate antagonists by race until things cool down.<sup>92</sup> Penalizing such separation would represent a clumsy, dangerous, and formalist application of the general rule.

In general, then whether one thinks a process is “distorted” because it is formalistic depends on one’s moral framework, and not merely on matters of description. Whether “the situation” is sufficiently individuated is ultimately a moral issue concerning what criteria should be taken as material in judging it. One is not being “formalistic” in any pejorative sense when one insists that the only criteria for being a voter in general elections in a democracy are citizenship and adult status (specific disqualifications and administrative requirements aside). Differentiating certain particular situations is exactly what one is *not* supposed to do when recognizing who has the perquisites of personhood and is seeking to exercise them in various situations. Just when such differentiations are called for may be contested—e.g., the distribution of seats in an educational program. But it is often quite clear which is which.

(iii) *Formalist interpretive theories applied by adjudicators.*—One can also think of formalism as the selection or rejection of particular interpretive theories. While this perspective is implicit in the preceding remarks, it deserves separate mention. Indeed, the most common target of a charge of formalism is a court that is interpreting either a canonical text (constitution, statute, regulation) or the semi-canonical text of a prior rule of decision accepted as precedent.

Suppose, for example, one holds that the Eighth Amendment’s ban on cruel and unusual punishment, like other constitutional phrases, must be understood first (and if possible, exclusively) by reference to the Framers’ intent. In turn, that intent is to be revealed by appropriate historical research, which shows that the Framers’ paradigms were  $P_1, P_2, \dots, P_n$ —where “n” is a pretty small number—and that is all. The only scope for “expansion” lies in a very narrow criterion of “strong resemblance” to any  $P_i$ . A judge then says, “I am sorry. I must rule this way. The practice of impressing prisoners into involuntary service in testing new mind-altering drugs, even when the prisoner is not disordered, is very risky and an offense to human dignity. It treats prisoners like lower animals or even mere things. But that ‘dehumanization’ criterion is not written into the Eighth Amendment; I am bound by the meaning of the constitutional text. I cannot simply ask, ‘What is this list of  $P_i$ s about?’ ‘What is the authorizing generalization that explains why the Framers hit on these?’ If that generalization is what they meant to implement, they should have said so. But the text’s meaning is defined primarily by reference to its authors’ intentions, and all I can find are specific instances that they mentioned. I am not free to ask, ‘What is the

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solely on the separate denotations of “motor” and “vehicle”—possibly leading to a ban on the tricycle? Or to deal with “motor vehicle” as a combination term bearing a narrower sense—likely resulting in allowing the tricycle to operate? Is it formalistic to downgrade legislative history as evidence of legislative purpose? Or is it the other way around?

92. See *Lee v. Washington*, 390 U.S. 333, 334 (1968) (upholding a lower court order invalidating Alabama laws requiring prison segregation; the Court rejected the state’s claim that the lower court’s decision ignored matters of security).

best most coherent theoretical/philosophical account of cruelty that would both explain the Framers' examples and also properly serve us in light of present views about human suffering and its causes and effects.””

Is this judge a formalist for having picked too restrictive a theory of interpretation, one that locks us into an earlier world of only partial relevance to our own? That too is a moral decision of sorts, usually characterized as a matter of legal/political philosophy. The formalist stance excluding new moral insights also excludes from Eighth Amendment scrutiny new sanctions that were not only unknown in the Framers' time, but also cause unforeseen kinds of impacts viewed now as serious harms. For example, a technique of prolonged total sensory deprivation may be far more damaging than standard solitary confinement, but might not be cruel and unusual punishment because it isn't on the Framers' list of forbidden punishments and might not even have been thought of by them as a harm.

(iv) *Formalism and being stuck at lower-level abstractions.*—When encountering principlism or casuistry (see Part III.C.2-3), the principles, maxims, or other decision making guides will sooner or later run out. If the decisionmakers fail to consider the deeper rationales behind the guides, one might accuse them of formalism because they are failing to consider all matters material to reaching a right or acceptable answer. Formalistic failures can arise from not attending either to matters below or above the level of abstraction in use, although, ultimately, the materiality of what is “below” will be affected or determined by what is “above.”

(v) *Formalism and bioethics.*—Much the same can be said about the interpretation of other key concepts—e.g., equality, liberty, due process—whether as embedded in the Constitution or as freestanding moral concepts analyzed independently. Of course, depending on one's interpretive theory, the latter may inform the former in various degrees. These basic values are critical to bioethics, even if one uses a principlist heuristic. All the major players in principlism (see Part IV.C.3.a.i) know full well that the very choice of principles is ultimately justified, *if at all*, by more general theories.<sup>93</sup> They also know that the best resolution of any number of cases will remain hard to specify under principlism. However, a given analyst's narrow range of application of a short list of critical values suggests a rigidity of view owing more to visions of Platonic Forms than to the detailed realities of daily life. Some may still believe, for example, that legal segregation of the races does not violate a principle of equality where the facilities are “equal.”<sup>94</sup> This is “formalist” (read “narrow” or

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93. But cf. Toon, *supra* note 34, at 17.

Disenchantment with the results of medical philosophy arises largely because too much has been expected and claimed for bioethics. An example of the result of placing an excessive burden on a concept unable to sustain it is what Clouser and Gert call principlism; the notion that beneficence, autonomy, justice, and non-maleficence could solve ethical problems rather than be a useful framework for clarifying them.

*Id.* (citation omitted).

94. *Plessy v. Ferguson*, 163 U.S. 537 (1896). *Brown v. Board. of Education*, 347 U.S. 483

“morally purblind”) because it fails to understand and properly value the harms done to the nondominant segregated group—the notion of harm is read too thinly. Even if the harms are rightly valued, their bearing on equality is unappreciated—because the reigning notion of equality is not rich enough.

Consider next an example from the jurisprudence of death. In the Ninth Circuit’s opinion in *Compassion in Dying v. State of Washington*,<sup>95</sup> the court characterized earlier refusal/withholding-of-care decisions as being governed by the principle that one has the right to time one’s death. From this, one infers a right against interference with a physician’s voluntary decision to help a patient who wishes to die by supplying the means for a patient to self-destruct.

There is certainly a “creative,” perhaps even a “romantic” aspect to this line of analysis.<sup>96</sup> It was innovative lumping: we are told that refusal of care and assisted suicide both go to timing of one’s death. It was also hamfisted lumping: we are also told that there is no difference between refusal of care and self-administration (or even administration by another) of a death blow. This is the intellectually elite, supposedly sounder philosophical view of the action/omission distinction, but it is very far from being universally embraced by the public or by precedent or tradition—and this is a critical factor in current forms of *constitutional* adjudication. The Ninth Circuit’s leap has a distinctly formalistic aspect: it ignores varying situations—such as the differences between “letting die” from pathological processes clearly “on the job” and affirmatively causing death by administering a death blow.

In the well-known classroom example of someone jumping off the 100th floor and getting shot dead while passing the fiftieth floor, there is little doubt that death was caused by the affirmative act at the fiftieth floor (compare ingesting the lethal prescription drug), rather than the process already in place that was begun by the leap from the 100th floor (compare the pre-existing medical condition). The Ninth Circuit court took the more general concept of the time of one’s death to relate these different kinds of cases, after peremptorily dismissing the rationality of the distinction. I am not joining issue here with those who think that the distinction collapses in matters of terminal illness. I am commenting on constitutional interpretation which, by tradition, searches for unmentioned liberty interests by relying heavily, but not exclusively, on matters of “tradition” and “history,” even where tradition and history are equivocal or indeterminate.

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(1954), held otherwise for public education without flatly overruling *Plessy*, which concerned segregation on railroad trains.

95. 79 F.3d 790 (9th Cir. 1996), *rev’d*, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding that the right to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause).

96. “Romanticism” in judicial style is a topic addressed by some legal historians. See, e.g., MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 152-62 (1994). Although Glendon does not suggest a formal definition, she uses the term “romantic” after characterizing several Justices noted for “their daring, imagination, sensitivity, and zeal for fairness . . . .” *Id.* at 152.

As we saw, flat-footed rules may well be justified, whether or not one translates flat-footedness into an ascription of formalism. Many states have an explicit or implicit ban on assisted suicide.<sup>97</sup> No exceptions are made, even in cases that cry for the relief of suffering and satisfy the most rigorous criteria of informed consent without the faintest whiff of undue influence. Without plunging deeply into the debate, it is enough to say that such a rule has at least a colorable justification based on the risks of error in individual cases, the costs of individuation, and the learning effects from the communicative impacts of a visible, explicitly authorized death-by-request practice sanction.

Now consider an example from transplantation. At one time, most physicians involved in transplantation would flatly refuse to allow donations from strangers and would rarely proceed even if the source was a friend of the patient.<sup>98</sup> What visions of reality and what moral standards account for this? Is the idea that "only persons with deep psychological problems would undergo the mutilation and loss of an organ for anyone other than a close relative—one's child, spouse, siblings, and parents. Autonomy doesn't extend to crazy persons." This is a very blunt rule, not calibrated to variations in circumstances. It fixes on a generality and refuses to consider if the rule embodying it might be missing something. If Mother Theresa had offered a kidney to a nun she did not know—or even a total stranger—would she have been excluded under this standard? Perhaps not, because she was perceived as relevantly different from most persons. If she was crazy or driven, she was crazy or driven in a different way—one sanctioned by religion and generally approved.

Consider next an example from assisted reproduction—gestational surrogacy once again. Perhaps we should say there simply is no "natural mother" because the classic criteria of motherhood—genetic connection plus gestation—point to two women. A court might then resolve the case on the default standard of the best interests of the child, leaving aside the (possibly) autonomy-promoting "parenthood-by-intention" theory as a judicial excrescence unsupported by legislation. The two women might then receive joint custody, or one might receive primary custody with visitation by the other, and so on.<sup>99</sup> This position may be wrong, but it is not necessarily formalist. Perhaps the opposing view that the role of initial intentions as presumptively decisive is wrong, but again, why

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97. See, e.g., CAL. PEN. CODE § 401 (West 1999).

98. See generally the discussion of donation by strangers in Carl H. Fellner, *Organ Donation: For Whose Sake?*, 79 ANN. INTERNAL MED. 589 (1973); Aaron Spital, *When a Stranger Offers a Kidney: Ethical Issues in Living Organ Donation*, 32 Am. J. Kidney Dis. 676 (1998). For more recent developments, see George Hatch, *Astounding Act: A Fisherman Saves the Life of His New Friend by Donating a Kidney*, L.A. TIMES, June 30, 1991, at B3 ("The astounding act of generosity surprises both men even now."); Gina Kolata, *Unrelated Kidney Donors Win Growing Hospital Acceptance*, N.Y. TIMES, June 30, 1993, at C14. On success rates for such donations, see Paul I. Terasaki et al., *High Survival Rates of Kidney Transplants from Spousal and Living Unrelated Donors*, 333 NEW ENG. J. MED. 333 (1995).

99. This seems to be Justice Kennard's position in her dissent in *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993).

is it formalist? It assumes that under the governing state law there must be exactly one natural mother, and this is far from a purblind position. It seems inappropriate to saddle either standpoint with the dreaded “formalist” label.<sup>100</sup>

The “formalist” epithet may better characterize some of the critics of bioethics than those the critics criticize. Consider the lumpish opposition to new reproductive techniques based on the theory that they “objectify” or “commodify” persons. With some notable exceptions,<sup>101</sup> the complaints are made with little or no accompanying argument about what these predicates mean, or about the causal mechanisms for the processes. They ignore dissimilarities and speak only of parallels between, say, buying an appliance and pursuing a surrogacy.

So, formalism does not consider enough morally relevant variables, factors, dimensions, and perspectives—from the framework of a moral theory that renders them relevant. If formalism is said to be logically linked to jurisprudential matters rather than to moral disagreements between formalists and their opponents, then one must ask: which jurisprudential rules apply? What—beyond basic rules of logic—justifies those rules? It may be a sort of value impoverishment that allows formalists to think that clear lines separate what is subsumed and what is not subsumed within a concept. Or perhaps they are simply less willing to acknowledge systematic vagueness and open texture<sup>102</sup> as inescapable features of major abstractions and of language generally. This leads to what others may view as odd splittings (segregation is not a forbidden inequality) and inappropriate lumpings (the right to refuse treatment entails the right to suicide assistance because both involve the abstraction “the right to time your death”).<sup>103</sup> To a nonformalist, then, the range of application of a formalistically interpreted abstraction may be too broad as well as too narrow.

Finally, there is a link between formalism and the next topic—principlism. Formalists are faulted because their inappropriate use of abstractions rests on

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100. On formalism, see, e.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1870-1960 (1992):

It aspired to import into the processes of legal reasoning the qualities of certainty and logical inexorability. Deduction from general principles and analogies among cases and doctrines were often undertaken with a self-confidence that later generations, long since out of touch with the inarticulate premises of the system, could only mistakenly regard as willful and duplicitous.

*Id.* at 16, “[J]udges and lawyers of the nineteenth century clearly believed that there were identifiable bright-line boundaries that judges could apply to a case without the exercise of will or discretion . . . .” (He argues that this is too easily caricatured.) *Id.* at 18.

101. See, e.g., Nussbaum, *supra* note 47, at 262; Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

102. The phrase is linked to Dr. Friedrich Waismann. See *Verifiability*, in LOGIC AND LANGUAGE [1st Series] 117, 119 (Antony Flew ed., 1968). See generally Michael Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981).

103. See *Compassion in Dying v. State of Washington*, 79 F.3d 790 (9th Cir. 1996), *rev'd*, *Washington v. Glucksberg*, 521 U.S. 702 (1997).

inadequate attention to particular variations from case to case. Principlism, however, deals with mid-level abstractions, generally avoiding the more general concepts that supposedly explain and justify them. If this avoidance is carried out to a fault, then the middle principles may be incompletely understood and inadequately applied. Formalists, then, can wrongly fail to move, whether "down" or "up," or "sideways."

2. *Principlism.*<sup>104</sup>—There is a particular analytic technique within bioethics (but applicable in various forms to many disciplines) called "principlism." It concentrates on four intermediate principles—autonomy, beneficence, nonmaleficence, and justice. At one end, it leaves deeper moral theory aside to the extent possible; at the other, it eschews specific rules.<sup>105</sup>

There is nothing wrong with managing one's scarce psychic and physical resources by taking "shortcuts" and using crystallized modes of thought to think matters through. This can be efficient in the sense that it achieves a rational balance between accuracy of judgment in a given case, and the costs imposed when seeking perfection. These thinking tools are too loose to be algorithms, but they can be quite serviceable in advancing the decision making process. Their use is akin to "satisficing," as choice theorists might put it,<sup>106</sup> and is perfectly

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104. Despite principlism's focus on a particular set of concepts, it does not seem "formalist" in the sense of embracing a hamfisted, rigid interpretive stance. Formalism does not mean "dealing with concepts and abstractions"—a ludicrously expansive understanding that would apply to all reasoning. Nor should it be identified with the idea of abiding by authoritative rules. Cf. Schauer, *supra* note 88, at 510 ("Once we disentangle and examine the various strands of formalism and recognize the way in which formalism, rules, and language are conceptually intertwined, it turns out that there is something, indeed much, to be said for decision according to rule—and therefore for formalism.") (emphasis added). Perhaps what is meant here is "and therefore for certain aspects of formalism." Being rule-governed is simply a threshold—a necessary condition for being formalist, but not a sufficient one—although one might say that some exercises of formalism are so perverse that rule-governance itself is compromised. Later, Schauer concludes:

It may be that, in practice, to condemn an outlook as formalistic is to condemn neither the rule-based orientation of a decisional structure nor even the inevitable over- and under-inclusiveness of any rule-based system. It may be to condemn such a system only when it is taken to be absolute rather than presumptive, when it contains no escape routes no matter how extreme the circumstances. Such a usage of "formalism" is of course much narrower than is commonly seen these days.

*Id.* at 548.

In any event, at least some accounts of principlism have avoided heavy-handed denunciation of the use of higher abstractions in moral theory. See Raymond Devettere, *The Principled Approach: Principles, Rules and Actions, in META MEDICAL ETHICS: THE PHILOSOPHICAL FOUNDATIONS OF BIOETHICS* 27, 35-37 (Michael A. Grodin ed., 1995).

105. See TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 37-38 (4th ed. 1994). Principlism is not about the use of principles generally, but about using specific intermediate principles in particular contexts for certain purposes.

106. For an explanation of satisficing and "bounded rationality," see HERBERT SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE*

rational. Indeed, it may be morally mandatory and empirically inevitable. One major task of this approach is overconfidence that one has selected the right principles, applied them correctly to the situation, and thus successfully avoided turning to basic moral theory. However, in morally difficult cases—a prime characteristic of distinctively bioethical problems—the conflicts within and between the principles cannot be settled, if settleable at all, without moving up to higher and perhaps ultimate levels of abstraction. If this is understood and acted upon by looking “upward” in such cases, then there is, in principle, nothing wrong with principlism. Using heuristics is a key aspect of many decision making processes, and every field of thought probably has its principlist analogue for various tasks. If the limitations of shortcuts are not understood and properly managed, then they might well be called formalist, not because they fail to deal with particulars, but because they do not move to the higher abstractions that inform the middle principles.

Thus, to the extent that bioethics is attacked for harboring a principlist line of thought, the criticism is misplaced. The problems lie in understanding the limits of limiting oneself to principles without reference to theory at one end and to specific rules on the other. Although the apparent simplicity of the principlist agenda may mislead some, this is not fatal to the enterprise. Of course, one has to pick the right principles. But if the very choice of principles is contested, the protagonists are back in the more spacious (and time consuming) realms of moral philosophy.

### 3. *Casuistry and Pragmatism: Preferred Modalities?*—

a. *Maxims and postulates*.—The bioethics version of principlism bears comparison with an account of casuistry that addresses many issues in bioethics.<sup>107</sup> This approach uses abstractions of even lesser generality than “principles.” Instead, procedural postulates—“maxims”—requiring use of “paradigms” and “analogies” are followed to allow comparisons between particular cases, with close attention given to “circumstances,” such as who, what, where, etc. In this sense, casuistry’s level of abstraction is notably lower than that of principlism.

In theory, casuistry has a presence in several aspects of the critiques and defenses of bioethics. Has casuistry always been a part of establishment bioethics (if not known by that name) and thus part of what is being examined, or is it a weapon revived by the critics against overly abstract and arid modes of thought pursued by established institutions? In writings on clinical ethics and behavior at the bedside, one often finds apothegms or “formulas,” such as the Kantian injunction against mere use of persons as means, and apothegms. While Kant is viewed as being at the apex of high moral theory, the no-mere-use-of-persons formula (i.e., the second formulation of his Categorical Imperative)<sup>108</sup>

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ORGANIZATIONS, at xxviii-xxxi (3d ed. 1976).

107. See JONSEN & TOULMIN, *supra* note 7. For a comparison of principlism and casuistry, see BEAUCHAMP & CHILDRESS, *supra* note 105, at 92-100.

108. A common translation of the Formula is: “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means but

often seems to be invoked without much analysis of what the formula means. It is thus used less as high theory or a principlist principle and more as a casuistical maxim, although it may be a direct implication of principlism. Even more frequently invoked is the so-called Hippocratic "do no harm" maxim,<sup>109</sup> which is far more specific than the no-mere-use formula.

Still, there can be no *a priori* rejection of casuistry. It too can be a rational part of decision making. Although the issues at stake in bioethics are among the most serious and difficult matters one can address in law and ethics, our resources are finite and we must ration our time. The methodologies of principlism and casuistry are inevitable, whether or not so recognized and named, and, if their respective places and limitations are understood (a big "if"), unobjectionable.

b. *Pragmatism*.—Pragmatism has been enjoying a renaissance, at least among legal scholars.<sup>110</sup> It strongly criticizes concentrating on rules, principles, standards, and their embedded concepts and higher theoretical underpinnings. Perhaps many pragmatists are antifoundationalists—analysts who are skeptical about the existence of sound bases for our systems of thought and evaluation—but this is not entailed by their positions, which require that we ordinarily not get mired in matters of ultimate value.

It is true, as pragmatists emphasize, that much everyday decision making is done without explicit attention to particular abstractions. Indeed, such abstractions may be almost inaccessible to our conscious minds and may require exceptional acuity to discern through introspection. Despite their relative obscurity, however, abstractions influence patterns of thought and behavior that nonconsciously reflect these rules. If so, it is no surprise that much of our conduct can be rationalized in the sense that one can reconstruct thought and action to reveal rational substructures, despite the disorder and "gaps" in our conscious thinking.

At least when pressed, legal pragmatists do not deny the existence or effect of abstractions, and it is hard to see how they could.<sup>111</sup> It would be incoherent to

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always at the same time as an end." THOMAS E. HILL, JR., DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY 38-39 (1992) (discussing "the second formulation of the Categorical Imperative").

109. "Above all do no harm." See the discussion of this phrase in BEAUCHAMP & CHILDRESS, *supra* note 105, at 189 (describing the formulation as a maxim). According to Veatch, the derivation of the form and priority of the phrase are not entirely clear. See ROBERT M. VEATCH, A THEORY OF MEDICAL ETHICS 22, 159-62. (1981) (discussing the Hippocratic tradition).

110. See, e.g., Catharine Pierce Wells, *Improving One's Situation: Some Pragmatic Reflections on the Art of Judging*, 49 WASH. & L. REV. 323 (1992) (discussing pragmatism and formalism in adjudication).

111. See, e.g., Catharine Wells, *Situated Decisionmaking*, in PRAGMATISM IN LAW AND SOCIETY 275 (Michael Brint & William Weaver eds., 1991). Wells states:

[A] belief in situated decisionmaking does not entail the abandonment of structuring methods such as reason, generalization, and abstraction. Instead, it recognizes that there is more to legal decisionmaking than the mechanical application of these techniques

draw a sharp contrast between “rule-bound” thought and “situated” decision making. Indeed, the very idea of situated decision making, understood as involving only particulars and no abstractions, makes no sense. All rational thought requires, *at some stage*, the conscious or unconscious selection, interpretation, and use of abstractions. Even a quick, unreflective decision about whether to cross the street involves application of learned generalities based on our prior knowledge of direction, velocity, distance, and other variables bearing on the relationship between oneself, the street, and vehicular traffic. The maxim “look both ways before you cross” does not stand alone as a foundationless adjuration.

So what is the force of the pragmatist critique—not just against bioethics, but against much legal and moral reasoning and decisionmaking? Its point relates back to the notion of what is material to moral and legal analysis. What is material depends on the generalizations that govern the matter at hand. But whether material matters are indeed implicated in a given matter requires close attention to the details of human situations. Which “details” we see depends on prior abstract understandings, our frameworks of perception, and other variables, such as salience. A prime virtue of pragmatism is that it mandates the avoidance of premature filtering and exclusion of particulars—in direct contrast to formalism. Attention to particulars can result in important insights that lead to the formulation of new abstractions and new domains of relevance and the reformulation of rules, standards, principles, maxims, and heuristics. Given scarce resources, we cannot always undertake such reconstruction, but it remains something of an ideal: coming to see that the abstractions already in place are incomplete or otherwise misconceived is central to progress in any scientific or normative field. The pragmatic push toward a less-filtered scrutiny of what we perceive spurs, as we saw, a continual cycling between the selection and the application of abstractions. It also helps us identify and revise or partly neutralize internalized cognitive frameworks that affect our very capacities for perception and evaluation.

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and, for this reason, it sees all legal reasoning as ‘situated’ in the sense that it operates within a structure that is constructed by the decisionmaker’s own unique mode of participation in the ebb and flow of human events.

*Id.* at 289. If pragmatism is simply anti-formalism, then most reflective persons are pragmatists.

*See also* Brock, *supra* note 4, at 226-28, discussing “particularism,” which holds that moral reasoning in practical and policy contexts begins and remains with the specific concrete case under consideration. *See id.* at 226. This seems similar to various accounts of pragmatism. Brock later states that

[t]he central and fatal problem for particularism . . . is that it is incompatible with the very process of having and offering reasons for our moral judgments, which is the principal feature distinguishing morality from mere expressions of simple taste or preference. Some, at least partial or fragmentary, moral theorizing is an unavoidable part of moral reasoning, of making and offering reasons for moral judgments in practical and policy contexts.

*Id.* at 228.

Thus, as a matter of rational pursuit of real-life decision making and adjudication, asking "What happened" often seems an appropriate starting place. How else would one know where to look in the realm of categories and concepts? Still, asking what happened does not divorce us from abstractions—description itself presupposes general frameworks.<sup>112</sup>

*4. Insufficient Empirical Research, Beyond Characterization of Particular Situations.*—Is it silly to complain that bioethics is insufficiently empirical, in the rigorous methodological sense of investigation the nature of human practices and interactions and states of affairs? After all, if one wishes to do behavioral or anthropological research, why pursue bioethics? It is not a science (behavioral or otherwise).

But it's not so silly. Think, for example, of problems of informed consent. One might well start with asking, "Whose informed consent?" The patient's? The nuclear family's? The extended family's? The matriarch's? The underlying question at this stage is, "What is the unit of autonomy in *this* transaction?," not "What ought to be the autonomous unit on objective, cross-cultural moral grounds?" What features of decision making are altered if attitudes toward individuality and community differ from culture to culture, assuming we can even identify discrete "cultures" (which in any case may be evolving)? What has happened when these cultural variations were ignored or even overridden by "mainstream" medical decision making processes? Have there been attempts to alter the viewpoints of "outlier" groups and individuals—the "culturally displaced"? If so, what happened?

These questions would not have arisen unless troubling incidents had occurred or been anticipated, but we cannot know the nature and extent of the problems without empirical research. Wearing a bioethicist's hat is not incompatible with doing such research, although the likeliest path would involve collaboration with trained investigators. Furthermore, whatever studies have already been done are likely to be sought out by or brought to the attention of bioethicists, lawyers, lawmakers, and judges. But bioethics and affiliated disciplines have a scarce resource problem of their own: how much time and effort to devote to investigating cultural variables and the variable roles of autonomy—or any other area of behavioral research. One cannot evaluate organ and tissue transplantation without knowing of supply shortfalls and demand variables, the status of medical/surgical technology, facts about queuing and distributional practices, and so on. One cannot assess the issues of genetic privacy without knowing what current and projected practices are, what genetic testing and fact-gathering turn up, and the status of security/access technology.

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112. Cf. Green, *supra* note 14, at 182. Green observes that bioethics is strongly attentive to empirical/situational issues and is heavily interdisciplinary, but that

while ethics and moral philosophy may sometimes represent a relatively small part of the actual work of bioethics, they form in a sense the confluence to which all the larger and smaller tributaries lead, and, more than any other single approach, the methods of ethics and philosophy remain indispensable to this domain of inquiry[.]

How easy is it to hack into existing medical record files? What sorts of questions do employers and insurance companies request? How often and in what ways are they answered? And what is the business entity's response to these answers with respect to the nature of employment or insurance offered or denied?

Roaming the field of bioethics reveals many other contexts where rational analysis would be greatly aided by empirical information. Shouldn't we worry about errors in following or declining to follow advance directives or requests for PAS?<sup>113</sup> What do we really know about how accurately people gauge their future mental states?<sup>114</sup> (Of course, even if the forecasters are inaccurate, this does not establish that anyone else could make better predictions for them.)

Are bioethicists remiss in not seeing the need for research and observation beyond the situation at hand, and calling for or even pursuing such investigations? I see no evidence of this. There has been a fair amount of empirical research called for and/or pursued by persons who view themselves as doing bioethics.<sup>115</sup> Moreover, if a given scholar is interested in thinking about, say, the dimensions of decision making incompetence, she can make a useful contribution by searching out the structure of that notion without doing a lick of empirical research. Sooner or later, she may come up with testable propositions, perhaps concerning the nature of the decisions taken by people afflicted with mania, depression, and the delusions associated with florid schizophrenia and how they compare *inter se*. If she does not, so what? Division of labor, which no doubt preceded fire and the wheel, remains appropriate in moral and legal analysis, as it is elsewhere. If there are some who offer conclusory views or arguments that require empirical support and none is available, they can rightly be upbraided for it, but this does not taint the entire field. Nor is there anything wrong with offering hypotheses for others to test. Still, to the extent that any area is burdened by lack of information, it would be a clear case of "progress" if more personnel recognized the need and spurred the search for the relevant data.

Are there any instances in which a writer, on-the-line actor, or an entire movement has, with great assurance, made a claim that cannot be supported without empirical inquiry and failed to recognize or call for such inquiry, mistakenly believing that no factual investigation is required? Probably. One possible current example is the belief that PAS is urgently needed because so

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113. Cf. Vicki A. Michel, *Suicide by Persons with Disabilities Disguised as the Refusal of Life-Sustaining Treatment*, 7 HEC FORUM 122 (1995).

114. See generally Philip J. Hilts, *In Forecasting Their Emotions, Most People Flunk Out*, N.Y. TIMES, Feb. 16, 1999, at F2.

115. See, e.g., Else Bjør et al., *Can the Written Information to Research Subjects Be Improved?—An Empirical Study*, 25 J. MED. ETHICS 263 (1999); Leslie J. Blackhall et al., *Ethnicity and Attitudes Toward Patient Autonomy*, 274 JAMA 820 (1995) (some groups adhere to a family-centered model of decision making); Rafael Dal-Ré et al., *Performance of Research Ethics Committees in Spain: A Prospective Study of 100 Applications for Clinical Trial Protocols on Medicines*, 25 J. MED. ETHICS 268 (1999). See generally Tony Hope, *Empirical Medical Ethics*, 25 J. MED. ETHICS 219 (1999).

many patients suffer intractable pain.<sup>116</sup> The first several patients using the Oregon PAS law apparently were far more concerned with loss of autonomy and independence than with physical pain.<sup>117</sup> Not everything that needs to be done has been done, a mere generation or two into the discipline of bioethics.

Finally, a simple insight understood by any student of evidence: “relevance” and “materiality” are functions of the governing issues and their location in the conceptual map of rules, principles, standards, maxims, paradigms, and analogies governing the case. Rational selection of empirical issues for investigation presupposes conceptual analysis, which is part of the mission of bioethics. True, a “naked interest” in finding out about some aspect of the world may produce findings that spur new conceptual analysis. Even then, however, what one or finds ultimately is deemed material (if at all) only within the abstractions inspired by the findings.<sup>118</sup>

#### *D. Insufficient Focus on the Most General Abstractions*

Perhaps there is some rule of Newtonian symmetry in critiquing “disciplines”: for most complaints there is an equal and opposite one. For every soldier in the bioethics army gazing abstractly at the cosmos to no apparent effect, there is another fixedly studying her toes, to equal effect. The complaint that abstractions are *insufficiently* addressed is frequently found in the reproaches against principlists and casuists.<sup>119</sup> If a rigid focus on abstractions is formalistic, perhaps so also is a rigid focus on apothegms, rules of thumb, and details. The point of the complaint is that however useful it is at some stage to confine one’s attention to “intermediate” principles, or to rules or maxims or particular situations, higher-level theory is needed for certain essential tasks: justifying the selection of principles, rules, maxims, and facts; rank-ordering them; interpreting them; and dealing with their internal incoherences and conflicts with each other. This entails a continuous cycling between the higher and lower conceptual and factual reaches.<sup>120</sup> The obvious but non-decisive

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116. See Arthur E. Chin et al., *Legalized Physician-Assisted Suicide in Oregon—the First Year’s Experience*, 340 NEW ENG. J. MED. 577 (1999).

117. See *id.* at 582.

118. See generally Brody, *supra* note 20, at 162-65.

119. See *infra* Parts II.E.2-3, III.C.3.a.i.

120. See Green, *supra* note 14, at 189, 190, 195. The author states that:

How, . . . when principles are in conflict, is it possible to make progress in normative discussion unless one has at hand some procedure for establishing priorities among principles, and how is that procedure defended apart from a more basic understanding of the moral reasoning process? . . . [M]oral analysis cannot be confined to a process of identifying and applying moral principles, however sophisticated this process might be, when the essential work of deriving the basis, meaning, and scope of these principles is left undone . . . Until that perhaps utopian day when theorists develop an indisputable correct method of moral reasoning, applied work must always remain in conversation with moral theory as [a] whole. Bioethics will progress methodologically

response by principlists and casuists is likely to be that the higher theoretical abstractions may be of little or no assistance in doing any of these tasks and in given cases, this may well be true.

#### *E. Excessive Focus on Autonomy*

This reproach to bioethics was mentioned earlier and I add only a few points. It is an especially annoying criticism of “establishment” bioethics. Whether the focus on autonomy is overdone depends on the meanings of “autonomy” and their locations in a value hierarchy. To the extent that autonomy rests on opportunities to pursue one’s preferences,<sup>121</sup> deference to it in given areas may depend on the intensity with which these preferences are generally held. There may be domains of choice in which many persons are more or less indifferent to various outcomes, although they might want to retain personal choice in these matters. Moreover, if pursuit of certain preferences raises risks to others (and perhaps the actor also), strong deference to autonomy might be unjustifiable. It is not as if autonomy was all of a piece in every sphere, mindlessly invoked as the preeminent or sole value whatever the circumstances.

I suspect that few persons in Western culture think autonomy is a weak or immaterial consideration in moral, political, or legal analysis. The fact that autonomy “loses” in a particular case against competing concerns does not eliminate its materiality, even in that contest.<sup>122</sup> The more common argument is that too many parties view autonomy in a naive way, or rate it too highly in some area even after reflection, or are simply obsessed with it.

The idea that love of autonomy may be extravagant is thus far too general, and its strands of meaning should be separated. Libertarians and communitarians

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if it retains this insight . . . .

*Id.* This necessary interaction between the various levels of “theory” and “application” is thus somewhat different from that between theory and application in mathematics. In practical mathematics, it is rarely necessary to test foundations, as observed in Loretta M. Kopelman, *What Is Applied About “Applied” Philosophy*, 15 J.Med. & Philos. 199, 200 (1990). She also argues that in many cases, higher theoretical concepts “applied” in philosophy are changed by the application, and that therefore applied ethics is not “derivative.” *Id.* at 200-02. This seems akin to arguing that a rule of decision applied in adjudication is “changed” by all or some of its applications. This is a tricky proposition, but it need not be dealt with here.

121. This is of course not the whole of autonomy. *See generally* Michael H. Shapiro, *Is Autonomy Broke?*, 12 LAW & HUMAN BEHAV. 353 (1988) (reviewing CHARLES W. LIDZ ET AL., INFORMED CONSENT: A STUDY OF DECISIONMAKING IN PSYCHIATRY (1994)).

122. Cf. BERNARD WILLIAMS, MORAL LUCK 73-74 (1981) (stating the “[t]he [obligation] that outweighs has greater stringency, but the one that is outweighed also possesses some stringency . . .”); Bernard Williams, *Ethical Consistency*, in ESSAYS ON MORAL REALISM 41, 49 (Geoffrey Sayre-MCord ed., 1988) (“It seems to me a fundamental criticism of many ethical theories that their accounts of moral conflict and its resolution do not do justice to the facts of regret and related considerations: basically because they eliminate from the scene the ‘ought’ that is not acted upon.”).

are far apart in their rankings of autonomy, but this is largely a matter of serious moral disagreement, not necessarily some blunder of thought or deficit in moral sensibility. A field is not “weak” just because many of its protagonists do not share the critics’ moral stances.

Of course, if the field were exclusively defined by one polarized view or the other, then we could rightly complain about the narrow views of its personnel. A field dominated by rigorous libertarians might seem to others to reflect an indifference to human suffering and an unduly narrow range of perspectives. It would be more like a special interest group or political party than a discipline, and for that reason, its moral stature would be impaired. Much the same holds for uncompromising communitarians. “Progress” here would consist of coming to see that one’s framework is too shallow to allow balanced insights. Perhaps it even makes sense to say that re-staffing such fields constitutes or facilitates a partial “catching up” of ethics and law with technological change. In any case, neither form of rigidity dominates bioethics.<sup>123</sup>

An “obsession” with autonomy may involve assigning insufficient value to certain countervailing considerations.<sup>124</sup> Talking without qualification about the right to speak freely disregards the harms from, say, false defamatory statements of public officials and figures, fraud in advertising, incitement to unlawful acts, and disturbing the peace of a residential community.

Are too many of autonomy’s countervailing considerations ignored or ranked too low in bioethical discourse? I don’t think so. On the contrary, it is often the critics of the supposed autonomy-obsessed who make the opposite error by failing to deal with autonomy attentively. In *Matter of Baby M*,<sup>125</sup> for example, the court flatly asserted that the surrogate mother’s consent to the transaction was irrelevant. There was little argument, no recognition that asserting the irrelevance of consent is in tension with a fundamental moral and constitutional value—virtually nothing. Moreover, I see no evidence that surrogacy’s defenders consistently ignore the risks of coercion, duress, undue influence, false consciousness, the incentives supplied by low income, risks of regret, harm to the

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123. See AMITAI ETZIONI, THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY (1996) (offering his version of communitarianism); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 137-160 (1962) (expressing a libertarian vision); see also EZEKIEL J. EMANUEL, THE ENDS OF HUMAN LIFE: MEDICAL ETHICS IN A LIBERAL POLITY 5-6 (1991) (commenting on such perspectives). See generally Christopher Heath Wellman, *Liberalism, Communitarianism, and Group Rights*, 18 LAW & PHIL. 13 (1999).

124. For our purposes, countervailing considerations include “preconditions” for sound exercise of autonomy as well as opposing values. I am distinguishing here between competing values arrayed against autonomy, and the presuppositions or preconditions for an exercise of autonomy in its ideal forms (whatever they might be)—e.g., competence, authenticity, voluntariness, and certain others. Perhaps these preconditions for autonomy can also be viewed as arrayed against it in certain ways: they pit naked expression of preferences against the interests of the actor (a paternalist perspective) and also against whatever risks to others are posed by incompetent, coerced, impulsive, or unduly influenced choices. See also the next subsection.

125. 537 A.2d 1227, 1249 (N.J. 1988).

child, racial type-casting, wide-ranging objectification, and so on.<sup>126</sup> Nor is there any evidence that students of organ transplantation, physician-assisted suicide and euthanasia, and the withholding of life-prolonging care have been consistently overlooking similar material matters. The literature and the case law are available for anyone to inspect. Most of the cases involving termination of lifesaving care, for example, expend major resources not only on investigating what patients seem to want, but on determining how far these expressions can be credited, given the tableaux of circumstances.<sup>127</sup> Things of course are never seen all at once and we will never be finished finding and assessing new things, but bioethics is clearly on the job.

Let us turn now to another example of supposed excessive attention to autonomy. I expect many or most critics of bioethics would view, say, *Johnson v. Calvert*,<sup>128</sup> as reflecting undue emphasis on autonomy in accepting the parenthood-by-intention theory. But what exactly is the *error* here—the wrong theory or principle, or the theory or principle misapplied, or the false paradigm or analogy, or the impoverished moral sense that must be enriched by the critics' protests? What points were missed? What was it that the majority and its supporters did not understand? How do the critics know that they themselves do not understand? Surely autonomy in planning reproduction is not immaterial, even if one finds some plans inappropriate. Was autonomy rated too highly in *Johnson*? Or was it applied without due attention to risks of regret, undue influence, coercion, false consciousness, race (Anna Johnson was black—and Regina Crispin was Filipino), harm to children, to the particular parties involved, to women generally, and to the overall social fabric, which is weakened because of the reinforcement of the attitude that persons are things to be used? Some decision makers value autonomy enough to accept risks of regret and other harms, but this does not make them morally benighted or guilty of clear error.

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126. See generally PAUL LAURITZEN, PURSUING PARENTHOOD: ETHICAL ISSUES IN ASSISTED REPRODUCTION, at ix-xxi, 3-67 (1993) (discussing "basic opposition to reproductive technology.") The author states that in considering in vitro fertilization, "[beyond] the simplest case . . . within a marriage where care is taken to avoid destroying or risking embryos . . . we discover that the worries about the commodification and mechanization of reproduction [discussed earlier by the author] become increasingly grave." *Id.* at xix. Nevertheless, Lauritzen concludes that "the basic opposition to reproductive technology is misplaced." *Id.* (discussing IVF and artificial insemination using sperm from one's husband)).

127. See, e.g., *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261 (1990); *In Matter of Quinlan*, 355 A.2d. 647 (N.J.), cert. denied, 429 U.S. 922 (1976); see also *Matter of Farrell*, 529 A.2d 404 (N.J. 1987) (careful evaluation of the preferences and condition of woman with amyotrophic lateral sclerosis who wished to withdraw care).

128. 851 P.2d 776, 851 (Cal. 1993). See generally Note, *Maternity Blues: What About the Best Interests of the Child in Johnson v. Calvert*, 24 SW. U. L. REV. 1277 (1995) (criticizing what the author calls "the 'intended procreator'" test). The case involved a dispute between the genetic parents of a child and the gestator. The court ruled that under California's Uniform Parentage Act, the "natural mother" was the genetic mother in this case because of the original expressed intentions of the parties initiating the procreational process.

To be sure, the critics of surrogacy are not so benighted unless, at the threshold, they simply dismiss autonomy considerations under the prevailing circumstances. Some seem to do so (once again, see the *Baby M* opinion), although in some spheres of conduct there is no starting presumption of autonomy, or only a weak one. Your decision to keep custody of your newborn rather than abandon her is not simply one of your options. Perhaps the more serious risk is not that of overstressing autonomy, but of letting it slide. Jay Katz, for one, has suggested that “[t]oday the idea of patient autonomy is once again in retreat.”<sup>129</sup>

I doubt, then, that discussions of autonomy have been morally or intellectually flawed, one side or the other (or both) not getting the point of discussion. A somewhat more plausible critique is that not enough persons holding different value rankings are writing and doing bioethics. This may not be correct, but in any event no discriminatory barriers to entry into this field exist. One should thus remain skeptical of the view that paradigms must be shifted or displaced, rather than progressively made more sophisticated (a hard line to draw, but there is a difference).

On the other hand, I do not think that the field of bioethics is flawed from within simply because it has its share of contributors who (in some eyes) undervalue autonomy. What might impair the field, if anything, is that the protagonists' understanding of autonomy and its countervailing values may be too blunt to be properly illuminating. If this is true of some writers, judges or legislators, however, it is not true of others.

1. *Ignoring the Preconditions for the Exercise of Autonomy*.—I make only two points here. First, it is hard to find evidence that either ethical or legal analysis in bioethics is tainted by a near-total failure to consider what I referred to earlier as autonomy's presuppositions: competence; voluntariness (entailing absence of coercion and undue influence); authenticity; perhaps consistency of preferences and richness of perspectives (no false consciousness); and, where appropriate, deliberation. However, a more precise attack is worth mentioning: the claim that these preconditions have been too narrowly interpreted. Thus, authenticity—the idea that one's conduct reflects “one's own actions, character, beliefs, and motivation”<sup>130</sup>—may be too easily assumed in a society where (say) patriarchy can inflict inappropriate attitudes, beliefs, and perspectival limitations on women.<sup>131</sup> Perhaps the idea of coercion is, as some argue, too narrowly

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129. Jay Katz, *The Nuremberg Code and the Nuremberg Trial: A Reappraisal*, 276 JAMA 1662, 1665 (1996). Katz, however, was discussing experimentation with human subjects.

130. RUTH R. FADEN & TOM L. BEAUCHAMP, *A HISTORY AND THEORY OF INFORMED CONSENT* 238 (1986) (emphasis added).

131. The extent to which patriarchy continues to prevail in the West is contested, although few doubt its massive influence. Cf. Paula Span, *Did Feminists Forget The Most Crucial Issues?: Wanting a Man and Children Does Not Make You a Non-Feminist*, *Anne Roiphe Contends*, L.A. TIMES, Nov. 28, 1996, at E8 (noting that in her book, *FRUITFUL: A REAL MOTHER IN THE MODERN WORLD* (1996), Anne Roiphe complains of feminist writings promoting “the view of the world as a giant evil patriarchal system”).

construed to ignore the effects of low income, class, gender, and race. This accounts in part for the ascent of concepts such as “false consciousness.”

Second, there may be a legitimate moral dispute about the proper understanding of autonomy’s presuppositions. Authenticity, for example, can be viewed as something of a paradoxical notion. We can understand, in a pre-theoretical sense, that the preferences of someone who has been “programmed” through rigorous behavioral conditioning are not entirely his own. We can also understand that general socio-cultural conditions can systematically warp someone’s development—as when women are trained from birth to obey men and confine themselves to childrearing and household chores. The result is a false consciousness in which many women do not understand that they have, or should have, a larger range of options.

Of course, arguments resting on the fact that some persons are burdened by narrow perspectives about themselves, their choices, and the demands of community are double-edged. Can we simply dismiss the wants and interests of all persons raised in such non-ideal conditions? De-conditioning the “brainwashed” is one thing (though not free of controversy); excluding several generations of falsely conscious women from full participation in a society is another. Few individuals or groups are uniformly non-autonomous. It is a wedge into totalitarianism to say that the preferences of millions of persons are to be ignored because they were improperly raised or educated, rendering many of their inclinations “false” because they stemmed from a politically skewed culture that systematically messed with their heads. *All persons* are heavily influenced by their surroundings. It is all too easy to impair autonomy by claiming to further it through such exclusions.<sup>132</sup>

As for coercion and undue influence, I suggest that it is inappropriate to claim that one is necessarily coerced when one’s circumstances are straitened. “Your money or your life” is one thing. “Would you like to make some money having a child for me?” is something else. Concerns about the social, economic and environmental conditions that limit choice and move people to do things that they would not do if they were better off do not justify disregarding their choices within that prevailing adverse situation. Impoverished persons are not necessarily made better off by restricting their options. One might argue that permitting certain choices within adverse situations improperly ratifies those conditions and thus encourages their continuance. But this is more an argument about strategies to bring about social change than an argument about autonomy. The notion that the output of bioethics maintains improper incentives to avoid social improvement is a reason for repopulating it with opposing troops, not for radical substitution of paradigms.

It may also be that claims of coercion and undue influence are proxies for worries about exploitation. But this takes us far afield, and, in any event, is closely related to issues of objectification, reduction, and mere use.<sup>133</sup>

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132. For a more extended discussion of the possibilities of damaging autonomy by addressing some of its aspects and not others, see Shapiro, *supra* note 121, at 353-401.

133. These ideas are discussed more extensively in Shapiro, *supra* note 47.

2. *Inattention to Ideas of Community and Responsibility.*—It is rare that analysis in any branch of bioethics fails utterly to attend to matters of community and responsibility; the field is not dominated by minimal-state libertarians constantly quoting Robert Nozick.<sup>134</sup> Discussion of “biological” treatments for mental disorder or for neutralizing dangerous persons inevitably pits matters of autonomy against community protection (to identify just one of the conflicts involved), and neither gets short shrift in either case law or the bioethics literature.

Illustrations are not hard to find. In *Washington v. Harper*,<sup>135</sup> for example, the interests of the prison community and the community-at-large overcame the prisoner’s interest in avoiding forced treatment that intruded on his immediate and short-run autonomy. Of course, the distinction between institutional/communitarian interests and personal interests is not a sharp one; indeed, the Court thought that compelled therapy would promote the prisoner’s “medical interests,” despite the arguable intrusion on autonomy.<sup>136</sup> The Court here was again somewhat simplistic, but it at least saw the point.

Discussion of innovative methods of reproduction is another example. The literature has, from the start, dealt heavily with threats to women and to feminist values, risks to children, and impacts on community beliefs and values. Debates about the non-use of lifesaving medical and nonmedical care and about assisted suicide and euthanasia have also, from the start, addressed risks to normative structures concerning community attitudes favoring strong protection of life; they have not just confined themselves to autonomy and relief of suffering. The oft-invoked “slippery-slope” analysis, when used correctly, must include the “learning effects” of various practices and institutions, including legal regimes and their implementation, on the community.<sup>137</sup>

Much the same can be said about the fields of genetic control, organ transplants, and virtually anything else identified as “bioethical.” Scrutiny of the literature does not support the claim of inattention to matters beyond self-regarding fixations on autonomy and rights. Genetic technology’s threats to employment opportunities, health care, social status, and so on bear on both individualistic and community-oriented values. Despite the restrictions on personal autonomy imposed by prohibiting commercial markets in organs for

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134. See generally ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

135. 494 U.S. 210 (1990).

136. See *id.* at 222-23, 231 (referring to the prisoner’s “medical interests” and non-medical “interests”).

137. See generally Michael H. Shapiro, *Regulation as Language: Communicating Values by Altering the Contingencies of Choice*, 55 U. PITTS. L. REV. 681, 713-30 (1994). “Learning effects” refers, loosely put, to changes in attitudes, values and beliefs arising from awareness and observation of or participation in social institutions, and from observed behavior generally. “The idea is that some regulation reflects, implements, reinforces or ‘expresses’—and thus teaches—certain values, attitudes and beliefs. It does so by repeatedly being perceived through certain frameworks, in much the same way that any human conduct is perceived and, possibly, learned from over time.” *Id.* at 713 (footnote omitted).

transplantation, these markets are nevertheless prohibited because of concern for the preconditions of autonomy (e.g., undue influence, “coercive” financial circumstances, authenticity); and the risks of objectification, erosion of socially preferred attitudes, and racial/ethnic caste-formation.<sup>138</sup>

An analytical sidebar is called for here. The contrast between personal autonomy and community constraints is easy to overstate. There is a clear overlap between them. Simplistic denunciations of a literature or discipline as favoring one to the exclusion of the other are hard to defend. Indeed, a purported attack on autonomy by communitarians may in fact count as a partial defense of it. For example, the community’s worries over the objectification of low-income groups within a legal market for organs clearly bear on the autonomy of each potential seller. With a legal market for organ sales, the group’s overall social and economic status may decline further, thus decreasing their members’ autonomy by reducing their opportunities. In turn, each individual exercise of autonomy in choosing to sell an organ contributes to the learning effects upon the community and thus creates long-term autonomy risks to the individuals within it. What these learning effects might be, however, depends on many variables. Our practices and institutions have multiple learning effects that impair autonomy in some senses and promote it in others. I do not say that this mixture of conflict and confluence of values is always clearly discerned by participants and auditors, but the mixture exists, and the discipline’s words and actions reflect this.

Debates about genetic control reflect the same implicit or explicit attention to these conflict- and conflation- ridden values. A quick look at the growing literature on human cloning reveals a strong focus on the supposed negative impacts on both communitarian and individual concerns.<sup>139</sup> Although I view the quality of analysis as weak, it contains no systematic, delusional exclusion of relevant categories of thought. My dim view of the merits of this sub-literature does not lead me to denounce the discipline generally nor even to think that this literature is demented.

3. *Inattention to Matters of Culture, Ethnicity, Race, and Gender.*—If this claim of inattention is plausible, it is no more so here than in most other realms of discourse and action. Dominant groups in any society—and the dominated

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138. See *id.*

139. See, e.g., GREGORY E. PENCE, WHO’S AFRAID OF HUMAN CLONING? 138, 141-46 (1998) (discussing the possibility of adverse changes in social attitudes); *id.* at 100-101 (discussing personal liberty); Dan W. Brock, *An Assessment of the Ethical Issues Pro and Con*, in CLONES AND CLONES: FACTS AND FANTASIES ABOUT HUMAN CLONING 141 (Martha C. Nussbaum & Cass R. Sunstein eds., 1998) (discussing possible individual and social benefits and harms). On cloning, see generally Lori B. Andrews, *Is There a Right to Clone? Constitutional Challenges to Bans on Human Cloning*, 11 HARV. J.L. & TECH. 643 (1998); CLONING HUMAN BEINGS: REPORT AND RECOMMENDATIONS OF THE NATIONAL BIOETHICS ADVISORY COMMISSION (1997); Brock, *supra*. For an earlier but still important work, see generally Francis C. Pizzulli, *Asexual Reproduction and Genetic Engineering: A Constitutional Assessment of the Technology of Cloning*, 47 S. CAL. L. REV. 476 (1974).

themselves—often fail to attend to the importance of and differences among various cultures, races, genders, and other groupings. Yet the very birth of bioethics as a field was marked in part by uncovering the Tuskegee syphilis research on uninformed and untreated black men, as well as identifying other, non-racially restricted experimentation on human subjects.<sup>140</sup> It was also spurred by recognition of the need to sort individuals as recipients of lifesaving dialysis treatments or organ transplants.<sup>141</sup> Bioethics was race, gender and culture-sensitive from the start and has remained so. Moreover, for the past several years, a great deal of scholarship has been devoted to the impact of race, sex, and culture on the physician-patient relationship, the process of informed consent, the delivery of health care, attention to the needs of future generations, and so on.<sup>142</sup> It remains unclear what, as a matter of moral and legal policy, we ought to do in any given case: should we defer to ideas that the autonomous unit is an extended family headed by a matriarch or patriarch, or should we focus largely on the individual patient? Should we evangelize for personal autonomy and insist that the patient herself make the critical choices? As I said, the issues have long been vetted and are attended to in increasingly sophisticated ways. Compared to the similar lack of success outside the field, the failure of bioethics to resolve fully the issues attending multiculturalism is hardly a major flaw.

4. *Inattention to the Risks of Reifying Autonomy, on the One Hand, and Compounding Professional Hegemony, on the Other.*—It may seem ironic that some critics who complain of excessive attention to autonomy also complain of health care providers and institutions exercising inappropriate control over one's life. Of course, there is no necessary contradiction here. One can believe autonomy is overvalued in some contexts and also believe that its proper value is threatened in other contexts. In any event, the clear and open recognition of

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140. See generally JAMES H. JONES, *BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT* 4-6 (expanded ed. 1993); ROTHMAN, *supra* note 6, at 70-84, 183.

141. See generally David Sanders & Jesse Dukeminier, Jr., *Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation*, 15 UCLA. L. REV. 357 (1968).

142. See *TRANSCULTURAL DIMENSIONS IN MEDICAL ETHICS* (Edmund Pellegrino et al. eds., 1992); Margaret Olivia Little, *Why a Feminist Approach to Bioethics?*, 6 KENNEDY INST. ETHICS J. 1 (1996) (part of *Special Issue: Feminist Perspectives on Bioethics*); Edmund D. Pellegrino, *Is Truth Telling to the Patient a Cultural Artifact?*, 268 JAMA 1734 (1992); Maura A. Ryan, *The Argument for Unlimited Procreative Liberty: A Feminist Critique*, HASTINGS CENTER REP., July/Aug. 1990, at 6, 8, 9; see also NORMAN DANIELS, *JUST HEALTH CARE* (1985); Leslie J. Blackhall et al., *Ethnicity and Attitudes Toward Patient Autonomy*, 274 JAMA 820 (1995) (some groups adhere to a family-centered decision making model); Darryl R.J. Macer et al., *International Perceptions and Approval of Gene Therapy*, 6 HUMAN GENE THER. 791 (1995); Mei-che Samantha Pang, *Protective Truthfulness: The Chinese Way of Safeguarding Patients in Informed Treatment Decisions*, 25 J. MED. ETHICS 247 (1999). Cf. Peter T. Kilborn, *Filling Special Needs of Minority Patients*, N.Y. TIMES, Feb. 14, 1999, at 16 (referring to the views of Dr. Louis Sullivan, former Secretary of Health and Human Services during the Bush administration: “‘A white physician can be just as effective.’ But Dr. Sullivan said familiarity with patients’ race and heritage led to better care.”).

autonomy can discourage the consolidation of excessive power in the hands of health care professionals. A concurrent qualification is that if autonomy is not handled with adequate sensitivity to its preconditions and countervailing considerations, we may make things worse in many ways. Autonomy, rightly understood, is not promoted when incompetent, coerced, or unduly influenced persons are left to their unfettered choices.

Happily, there is a three-in-one example of a lament about autonomy and bioethics, combining complaints about rational autonomy, promotion of the medical establishment's hegemony, and the very ideal of rational thought.

In recent years there has been an increasing critique of that philosophically based, predominantly abstract, rationalistic, mode of reasoning in bioethics, known as principlism. Unfortunately, however, the response to this debate through postmodern scholarship has, as Wolf observes, "scarcely been found in bioethics to date." . . . I will argue that the process of reifying and applying autonomy as an abstract principle avoids or suppresses an understanding of the evidence which points to power and control being an important characteristic of bio-medical discourse. The danger is that the naive rational application of the principle of autonomy within the substantive rationality of the powerful discourse of bio-medicine will only have a legitimizing effect which would affirm rather than challenge the status quo. The risk is that bioethical "talk" about autonomy may only create the illusion of providing the self-determining protection supposedly afforded to the individual by the application of this principle. By engaging in such rhetoric, bioethicists are unwittingly undermining the very value they profess to support. [There is then a quotation referring to "the oppressive status quo".]<sup>143</sup>

We are lucky to find so many questionable notions all in one place, and, as an added fillip, in a text replicating a "postmodern" literary style. This critique surely merits its own critique.

First, the opening account of principlism uses the phrase "reifying and applying autonomy as an abstract principle." Principlism tries to avoid "reification" of autonomy as an "abstract[ion]" by viewing it as a mid-level principle that contends with other mid-level principles—beneficence, nonmaleficence, and justice. Has principlism been conflated here with abstract philosophical thought generally?<sup>144</sup>

We are also told in the quoted passage that "response to this debate [about reifying autonomy] through postmodern scholarship has . . . 'scarcely been found'" in bioethics.<sup>145</sup> It is not said just what is absent. It is very clear that there

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143. Pam McGrath, *Autonomy, Discourse, and Power: A Postmodern Reflection on Principlism and Bioethics*, 23 MED. & PHIL. 516-17 (1998) (citations omitted).

144. See BEAUCHAMP & CHILDRESS, *supra* note 105, at 15 (describing levels of generality—ethical theory, principles, rules, and particular judgments).

145. *Id.* at 516.

is no deficit of critical analysis of the limitations and risks of using the term "autonomy" loosely, and, to turn matters around, it is "naive" to think otherwise. Perhaps the author thinks that anyone who offers a critique of autonomy is not in the field of bioethics, so the field stands infirm for lack of appropriate internal critiques.

As for affirming the status quo, the postmodern ideological position is apparently that the prevailing conditions embrace too much medicalization and physician control and implement a biomedical technological imperative oblivious to variant circumstances. But whether the status quo is truly "oppressive" depends on a set of value judgments that require far more attention to context than is provided. There is no automatic benefit from challenging the status quo. If conditions are morally wanting—as when the status quo is patriarchal and a given practice consolidates this situation without compensating benefits—they should be challenged. If they aren't wanting in some respect, however, one might rock the boat a bit to encourage review and rethinking, but trying to dislodge the status quo would be an unsupportable maneuver.

Apparently it is not all applications of autonomy but only its "rational application" that is risky. What is the idea here? Is "rational" a synonym for "formalistic" (something of a swear word, as already mentioned)? What is the *foundation* for the complaint about medical hegemony? That there is no such thing as medical expertise to which anyone need defer? That too many physicians are Republicans?

The author believes that autonomy talk can delude us into thinking we are being protected by the rational principle of autonomy. This is true: such delusions are possible. This is also old news. Dithering on about peace, freedom, equality, and whatever, can inspire a false sense of confidence. But why would one think that autonomy talk within bioethics is lulling anyone into a comfortable but false belief that things are more or less OK?

Perhaps the problem lies partly with autonomy's internal tensions, which have long been mined by opposing sides, all claiming to be vindicating autonomy. Some see forced treatment of the competent but mentally disordered as constitutive of oppression. Some even see such treatment of incompetent patients as oppressive. The problem is that there are autonomy "vectors" pulling different ways. Forced treatment of mental disorders may promote long-run autonomy by enhancing a patient's opportunities. It is doubtful that this is oppression where the patient is incompetent. Whether it is oppression where the person is competent but diminished by ameliorable illness is far less clear. Can this idea of long-run autonomy be abused? Think of casually invoking it to shut patients up whether they are competent or not, and even when they are not that ill? Absolutely. "Autonomy" and "incompetent" are dangerous terms, especially when paired in an effort to treat objecting patients by invoking the vision of a more autonomous and presumably more satisfying future. Perhaps the medical establishment malevolently installed these concepts in their treatment protocols to fortify their powers.

But critics of autonomy and of the medical establishment can also threaten autonomy. Suppose a competent patient delegates some important medical decisions to her provider (although we would say that a reasonably autonomous

person would not do so because it compromises the self-directional aspect of autonomy). We point this out to her, and she responds that as far as she is concerned, the pursuing-my-preferences element of autonomy trumps the self-direction aspect. She prefers to delegate. Insisting that she decide interferes with her autonomy-as-freedom-to-implement-ones-own-wishes. Perhaps she argues that she self-directedly decided to give up some self-direction. One can do this in health care as well as in home construction, although the respective risks to autonomy may be quite different. There are no important values that cannot be turned against themselves. If the particular sense of the value is not specified, it may be wrong to say that invoking the value misleads us into thinking it is being promoted. Talking about equality without specifying whether it refers to some form of equality of opportunity or some form of equality of outcome may make all the difference in the world. If one is fixed on equality of outcome, then when others extol the promotion of equality—for them, equality of opportunity—the two sides are at cross-purposes. Talking blandly about how our society promotes equality, freedom, or justice thus does not tell us what is going on or who is being misled in what way by existing work in bioethics. Assuming we do not abandon autonomy—after all, it is only its “rational application” that is condemned—what are the alternative forms of action and rhetoric? (I return to this point shortly, when inquiring into the author’s preferred modes of operation.)

Consider next the author’s complaint about “the modernist notion of revering principle over context . . .”<sup>146</sup> But “context” cannot be identified, parsed, understood, identified as relevant, and relied upon without reference to “principle.” We wouldn’t know what to look for as “context.” If we look for sick, suffering patients, we do so partly because we are wired up that way, but also because of principles embodying duties to relieve the suffering. Otherwise, the asserted context is just a mass of incoherent sensations. Of course, principle cannot lead us to a decision without premises about particulars. That there are formalists who need to attend more to situational circumstances is already known. Is *that* what this claim is about? To say that “autonomy must be contextualized”<sup>147</sup> states either the elementary idea that abstractions do not provide conclusions without concretions (the context, circumstances, particulars of the situation, etc.), or makes the factual claim that autonomy is *regularly* applied flatfooted and abusively because providers fail to consider individualized patient needs. This is not supported, except by unpersuasive anecdotes concerning the burdens of wearing hospital gowns (a universal complaint) and having blood drawn more than one wishes.<sup>148</sup> The fact that power is abused is an unfortunate fact of life, but there is little evidence that the prevailing bioethics rhetoric compounds rather than reduces the abuse, or that postmodern rhetoric would reduce it better.

Of course, much—perhaps everything—rests on what constitutes abuse or other improper treatment of patients. Drawing blood whenever it is needed,

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146. McGrath, *supra* note 143, at 518.

147. *Id.* at 522.

148. See *id.* at 521-22.

which McGrath laments,<sup>149</sup> is not a persuasive example. If it is done without permission or done impolitely, there is no serious issue: the medical staff is not supposed to do that. However, formal informed consent rituals are not ordinarily invoked here because most persons know that blood draws may be imperative for diagnosis, monitoring, and successful treatment. And it is “rational autonomy,” that insufferably dangerous notion, that is responsible for establishing the requirement of permission, if not civility, in the first place. The very complaints about blood draws and drafty hospital gowns rest rather heavily, if not exclusively, on autonomy to pursue our preferences to be pain free and retain our dignity by being clothed on all four of our sides.

Oddly, McGrath refers favorably to the crystallization of the right to refuse treatment, a major right deriving partly from autonomy considerations and seems assign some credit for this the workings of bioethics over an extended period.<sup>150</sup> So what’s the beef here? If the author favors a presumption against the use of “reductionist,” “medicocentric”<sup>151</sup> biomedical technology, there is next to nothing offered to support this. It appears simply as an outgrowth of an ideological indisposition toward medical technology, which not everyone shares *and which must be defended*. It is simply not enough to point out, as nearly everyone now knows, that medical technology as applied to the dying may or may not be beneficial or desired. Nor can one rest on the well-known inclination of some medical personnel to use medical means even when not called for. What, then, is the preferred alternative to “reductionist” and “medicocentric” medicine? No technology is risk-free—but *not* using technology is also not risk-free.

The closest approach by the author to a recommendation of what to do is hard to follow. McGrath describes the operation of a particular hospice, stating:

In the discourse of [the hospice] the idea of autonomy is not a bioethical principle to be applied to difficult situations, but a “way” of continuously responding to the needs of the client and his family. . . . “Basically what I see Karuna [the hospice] as doing is offering people a choice.” [quoting a “participant” (patient) in the hospice] This commitment to a broader notion of choice does not mean that members of this organization are not respectful of the more limited perspective of information giving and nonjudgmental support . . .<sup>152</sup>

But this alternative vision is not “alternative”! As far as I can understand the quoted remarks of the hospice participant, they are exactly what our vilified principle of autonomy calls for in that context. The passage is difficult to follow, however. What is meant by saying autonomy is “not a bioethical principle” but a “way”? What “broader notion of choice” is at work?

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149. *Id.* at 521 (quoting a patient statement from *THROUGH THE PATIENT’S EYES: UNDERSTANDING AND PROMOTING PATIENT-CENTERED CARE* (Margaret Gertis et al. eds., 1993)).

150. See *id.* at 523.

151. *Id.* at 518.

152. *Id.* at 525-26. The author quotes remarks such as “[o]ffer them the best options, best information, what the likely outcome of those options . . . they can make whatever choice.” *Id.*

Puzzlingly, the author then complains about “just giving information and asking for signatures on a consent form,” and extols “choice by doing.”<sup>153</sup> Perhaps she has reduced autonomy solely to information-giving. It is more than that. Moreover, one can autonomously decline to receive certain information.<sup>154</sup> Although there may be limits to our rights to refuse information, no serious autonomy scholars say simply that autonomy requires that you receive relevant information whether you like it or not.

And what is “choice by doing”? It seems to be twenty-four hour “holistic” care with counseling and psycho-social support.<sup>155</sup> Where is the choice by doing here? Who is doing/choosing what? The patient isn’t doing anything—everyone else seems to be hovering around her all the time. Can she refuse this omnipresent caring, or does entering the hospice—an establishment of its own—require her to buy into what it does? If so, is this a vindication of autonomy?

One concludes, not that the principle of rational autonomy is infirm, but that people do not regularly practice what they preach: physicians abuse their power and patients misuse the system. That is hardly the fault of bioethics—though it must attend to how real-world health care systems (like all systems) may fail, and to consider what fail-safe mechanisms to install. The hospice in question may provide more “holistic” and “spiritual” care (this would seem to involve beneficence at least as much as autonomy), but this is largely a matter of highly variable personal preference or taste. In any event, the “richer notion of autonomy”<sup>156</sup> the author endorses is not only not unknown to bioethics, it is, from what I understand of her account, the dominant notion. Its contrast with the supposedly objectionable “‘clear and distinct idea’ . . . articulated [in a] principle”<sup>157</sup> is not made clear. Is she asserting that her idea is *not* “clear and distinct”—or simply that it is not embedded in a principle—merely in a “way”?

#### *F. Excessive Attention to Rights*

While the critique of rights parallels the complaints about making too much of autonomy, it goes beyond it. This is no surprise because the actual vindication of autonomy and other values is often accomplished through recognition of legal rights enforced by the coercive power of the state. Indeed, talk of rights in any field using any moral characterization (e.g., “natural rights”) is likely to devolve (not “reduce”) to matters of law. If rights analysis is taken seriously, legal recognition and enforcement are inevitably considered, if not always implemented.

Criticism of rights-based systems may rest on a mistaken notion of how the term “rights” is being used. It may describe a bottom line conclusion that has

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153. *Id.* at 526.

154. See Shapiro, *supra* note 121, at 382-83.

155. See McGrath, *supra* note 143, at 526.

156. See *id.* at 528.

157. *Id.* (quoting ALBERT R. JONSEN, THE NEW MEDICINE AND THE OLD ETHICS (1990)).

already taken account of claims of presumptive right *and* countervailing considerations in a particular category of case; or it can refer to the starting presumption before countervailing matters are dealt with; or it may be used to describe a “trump” or absolute of sorts that rigorously excludes countervailing considerations. Other rights may be absolutes. Think of the constitutional bans on bills of attainder,<sup>158</sup> or the Thirteenth Amendment’s ban on slavery.<sup>159</sup> (Of course, the meanings of “bill of attainder” and “slavery” may be sufficiently doubtful that one is not sure what is “absolutely” forbidden.) To the extent that the rights recognized are viewed as absolutes rather than presumptions, the countervailing considerations, such as they are, are built into the articulation of the right.<sup>160</sup> In the United States, the “logic” of rights can take any of these forms, although it may be hard to tell from the text. In matters of constitutional law, the initial invocation of a right is, far more often than not, best understood as a presumptive or *prima facie* claim.

One can of course claim rights for all sorts of things—e.g., non-interference with and even affirmative access to physician-assisted suicide, abortion, food, employment, health care, insurance, shelter, and so on. One can also focus on such rights while failing to consider matters of duty or responsibility, injuries to others, injuries to communities, and injury to the rights-claimants themselves. As one might expect, sharp contrasts between rights-talk and responsibility/duty-talk are dangerous. Sometimes duties and responsibilities are the correlatives of rights held by others. And sometimes they may track “interests” of others that do not rise to matters of right. In any case, depending on what philosophical or

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158. U.S. CONST. art. I, § 9 cl. 3, 10 cl. 1.

159. *Id.* amend. XIII.

160. The parallels to the categorization vs. balancing issue in constitutional law are obvious. See generally Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992). But cf. John Ladd, *Legalism and Medical Ethics*, in CONTEMPORARY ISSUES IN BIOMEDICAL ETHICS 1 (John W. Davis et al. eds., 1978). Ladd discusses rights-talk as against “responsibility” talk:

[A] responsible decision [in bioethics] may require consideration of such different things as risks and benefits, other relationships, concerns, needs and abilities of persons affected by and affecting the decision. In addition, . . . it is usually necessary to “weigh” a number of factors against each other; the final decision often requires what we generally call “judgment”. . . . Decisions based on rights, on the other hand, are quite different. They do not permit taking into account most of the considerations mentioned, and they do not involve the same kind of weighing, deliberation, judgment, etc., that is called for in cases of responsibility.

*Id.* at 27-28. As an across-the-board matter within legal discourse, this is not the best way to describe matters. Much depends on what is meant by “the same kind of weighing . . . .” Adjudication of fundamental liberty interests may downgrade various state interests as un compelling or unimportant, at least in the case at hand, but at the threshold of argument, the ultimately outweighed interests are material—and remain so for future cases. The nature of the connection between the government’s action and its asserted or supposed goals is also evaluated within the standard of review being applied.

even religious system of thought we invoke, the two different forms of talk have major links.

There are two complaints about rights-based implementation of interests that are particularly relevant here. One is that the claim of right, whether against the state or private parties, concerns something that the claimant—or possibly anyone—should not receive or be able to avoid, simply upon making the claim. The second complaint is that although a given interest ought to be promoted, it is generally better pursued by means other than claiming legal or perhaps even moral rights, whether viewed as presumptive, bottom-line, or absolute.

As to the first complaint, whether what is claimed as a right (to receive or avoid) is a fit one for rights recognition depends upon the political theories and philosophies dominating the scene. A fair example might contrast a right against interference by the government publishing with one's writings, with a right to a minimum income, adequate housing or abortion. The first is essential to a democratic republic. The rest are contested. Such rights are written into some constitutions, but, in the view of most, not our own.

As to the second complaint, it would be coherent to argue that we should be able to receive affirmative assistance in dying, but that openly formalizing this by recognizing and enforcing a constitutional right to such assistance is too perilous (not to mention unjustified by a right reading of the constitution). It would encourage a weakening of pro-life values, have an excessive error rate, lead step by step to non-voluntary euthanasia, devalue not only persons who are terminally ill but non-terminal disabled persons as well, and ultimately expand to suicide-on-demand for everyone.<sup>161</sup> Whether this argument is sound is not the point: I am merely giving an illustration of an argument against vindicating as a matter of right what everyone concedes is an interest—the avoidance of

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161. See generally Sam Howe Verhovek, *Oregon Reporting 15 Deaths in 1998 Under Suicide Law*, N.Y. TIMES, Feb. 18, 1999, at A1. This article suggest that in these first 15 cases, that most of the decisions to seek and use physician-assisted suicide were based on feared losses of control and autonomy generally, not on severe physical pain or discomfort. See *id.*; see also Chin et al., *supra* note 116, at 577 ("[T]he decision to request and use a prescription for lethal medication was associated with concern about loss of autonomy or control of bodily functions, not with fear of intractable pain or concern about financial loss."); Wesley J. Smith, *Dependency or Death? Oregonians Make A Chilling Choice*, WALL ST. J., Feb. 25, 1999, at A18 (1999 WL-WSJ 5442052). Smith states that none of the first 15 persons who died as a result of Physician-Assisted Suicide ("PAS") was pushed into this by intractable pain or suffering. The patients evidently had strong beliefs in autonomy and suicide was chosen because of fears of future dependence. The author states that this was not the expected result—that choosing PAS would be a last resort against unrelenting and intolerable suffering. See *id.* He indicates that pain was not a factor in a single case of PAS among this group. See *id.* He also suggests that "legalization in Oregon has actually widened the category of conditions for which [PAS] is seen as legitimate." *Id.* In his discussion of disabled and elderly persons, he concludes the "dehumanizing message is that society regards such lives as undignified and not worth living." *Id.* The author notes that the information about PAS came from physicians who did the prescribing, not from those who did not assist their patients in dying. See *id.*

suffering, particularly severe suffering at the end of life.

The critique of rights recognition—especially legal rights—might benefit from addressing the idea that a legal right is linked to the possibilities of enforcement (whether or not one thinks there are “rights without remedies”). This of course involves matters of legal process and legal coercion. Some matters should not be embraced by such processes. No one has a right that another person fall in love with her/him. How would it be enforced? On the other hand, a child has a right, if not to the love of her parents, then to adequate nurture and support which may indeed include presenting an appearance of loving the child. This can be enforced, if clumsily.

There is thus something to the claim that vindicating certain interests should not take the form of recognizing enforceable rights against specified parties. The dispute is about what sorts of interests ought to be the subject of legal rights and what sorts should not, whether they have a role as moral rights. Have claims of right, as extolled in the bioethics literature and as vindicated in laws or regulations or judicial decisions, been overdone and oversold? If so, which rights, and in what ways overdone? It is not obvious that bioethics is guilty of this, but it is inappropriate to single out bioethics as the sole or main culprit. Legislatures, courts, and government agencies may be equally responsible, quite independently of bioethics commentaries. The argument against rights covers a far broader segment of law and commentary than that housed in bioethics. This, of course, does not let bioethics off the hook. Perhaps it should have leapt off the rights bandwagon. Yet it remains unclear what rights should not have been recognized or what the fallout from such recognition has been.

There is another interpretation of the rights critique that deals less with legal rights and more with bedside conversations and patient-physician and patient-institution relations. Suppose a patient, before an examination, announces to the physician that she has a legal right to be examined with due care as defined by prevailing medical custom, to be given the information a reasonable patient would want to know under the circumstances, and to be treated with dignity. All true. But why say it? Is it to put the *Fear* into a physician of a patriarchal bent?

But this view of the rights critique does not show it in a better light. Few question the point that as a matter of civilized human interaction, it is usually unnecessary and often counterproductive to *start out* with what is in effect a demand, although this may well happen.

It seems intuitively clear that there is a connection between protests about rights claims and about “overlegalization.”<sup>162</sup> The latter occurs (in part) when matters that should not be the subject of legal rights (or powers or privileges or other legal relations) and procedures are nevertheless implanted in that domain. So, a few remarks on overlegalization are in order.

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162. See Alexander Morgan Capron & Vicki Michel, *Law and Bioethics*, 27 LOY. L.A. L. REV. 25, 35-36 (1993) (The authors briefly review multiple aspects of “bioethics” and its historical origins; note the critique of “rights talk” but indicate that many legal commentators “resist overlegalizing the field”; the authors also urge that a central concern of law and bioethics “is to discern the limits of law as a mechanism to structure concepts and relationships in health care”).

### G. Overlegalization

1. *What Is It?*—“Overlegalization” may refer to several processes and outcomes: the use of formal procedures; the substantive nature and scope of regulatory fields or of particular legal rules; the application of certain legal relations—rights, powers, privileges, immunities—to certain situations; the specific legal/analytic techniques involved in a dispute; the idea of invasion of individual or familial privacy and autonomy through legally authorized or immunized intervention by “outsiders”—a breach of the “public/private” border; the asserted improper transformation of “moral” issues into legal issues; or the announcement and implementation of any principles, standards and rules that cut against firm community norms.

One can thus see some obvious and towering ambiguities in complaints of overlegalization. “This isn’t fit for legal regulation” is quite different from “You set up the substantive and procedural rules improperly.” The latter is not best described as “overlegalization” and I will not so consider it here. The term generally suggests that the state has gone beyond the proper limits of law-governance, rather than simply making a mistake in constructing the law in a particular way. The fact remains, however, that a claim of overlegalization may inappropriately be applied to matters dealt with nonoptimally by formal legal mechanisms that are otherwise rightly in place.<sup>163</sup>

But what does it mean to suggest that some province of human action should be beyond legal intervention, perhaps even of an “informal” or “alternative” sort? It does not seem to be a call for anarchy. It does not even seem to be a claim that there are areas utterly beyond “the rule of law.” Although it may seem paradoxical to say so, complaints about overlegalization are in a sense complaints that the rule of law itself is impaired or has failed because it has subjected autonomous persons to inappropriate regulation, in violation of some basic principle.

It is also difficult to know what to make of private ordering “outside” law

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163. See Daniel Callahan, *Escaping from Legalism: Is It Possible?*, HASTINGS CENTER REP. Nov.-Dec. 1996, at 34. “Legalism, may, then, be defined as the translation of moral problems into legal problems; the inhibition of moral debate for fear that it will be so translated; and the elevation of the moral judgments of courts as the moral standards of the land.” *Id.* Callahan attributes this, at least in part, to an “enormous moral vacuum in this country, which for lack of better institutional candidates has been left to the law to fill.” *Id.* at 34-35. This may roughly describe “overlegalization,” but I do not think that “legalism,” whether excessive or not, encompasses all “translation of moral problems into legal problems.” For one thing, there are no true “translations” of this sort. For another, “doing law” entails the entry, in one form or another, of moral norms, either in enacting or interpreting and applying laws. The announcement of legal norms may also reinforce the moral status of important values. See also George J. Annas, *Facilitating Choice: Judging the Physician’s Role in Abortion and Suicide*, 1 QUINNIPAC HEALTH L. J. 93 (1996) (complaining about too much law in bioethics, and characterizing bioethics as, at least in part, dealing heavily with analysis of the physician-patient relationship).

and courts, without the direct influence of particular rules, but nevertheless “within” classic domains of law and probably operating under its influence (“within its shadow”). One thinks of Ellickson’s description of “informal norms of neighborliness” that may differ in content and impact from legal rules.<sup>164</sup> Some “informal” norms are nevertheless part of a “customary” legal system. “Law,” even as we use it in “developed” contemporary culture, is not confined to courts or legislatures or law enforcement officers in action. But here we are skirting the edges of the dreaded question—what is law? All I do here is mention, not the well known jurisprudential literature, but the less well known work of legal anthropologists. They do not settle the conceptual issue about the range of “law,” but their work illustrates the possible varieties of what might rightly be called “law.”<sup>165</sup>

The idea that overlegalization is best viewed as the wrongheaded assimilation of moral issues into the law contains a kernel of sense but is nevertheless not apt. A simple example of inappropriate moral-to-legal assimilation would be to *legally* enforce all promises—not just the usual sort of contractual “promises,” but even promises to pick up one’s socks or meet someone for dinner.

Still, the stronger the moral right or duty, the more we must consider the possibility of making these moral relations matters of law, in the sense that they are part of formal community “ordering.”<sup>166</sup> Among the most important legal principles and rules are those whose moral status is so elevated that they seem to *require* legal ratification, in certain contexts whether by constitutional command, legislative or regulatory action, or formal adjudication: procedural fairness (notice, opportunity to be heard, and so on); freedom of speech and religion; varieties of autonomy and privacy, equality, justice, fairness . . . .

The moral/legal barrier is also breached by the necessities of rightly interpreting legal texts. We take interests we value highly (on whatever grounds) and *make* them legal rights of various sorts. We may select a canonical description embodying the moral right and implant it in a constitution or other law; or a common law court may select any of several alternative formulations

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164. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES at viii (1991).

165. See Sally Falk Moore, *Epilogue to SYMBOL AND POLITICS IN COMMUNAL IDEOLOGY* 210 (Sally Falk Moore & Barbara Myerhoff eds., 1975). The authors state that rituals, laws, customs, etc., are used “to fix social life, to keep it from slipping into the sea of indeterminacy.” *Id.* at 221-22. This passage of course contrasts “laws” with these “other” things, but at the same time suggests their strong parallels. On distinguishing law from custom, see generally E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN 18-28 (1954).

166. See COUNCIL ON THE ROLE OF COURTS, THE ROLE OF COURTS IN AMERICAN SOCIETY 85 (Jethro K. Lieberman ed., 1984) (referring to “[d]isputes that should not be settled privately because society has an important stake in governing them by authoritatively imposing public standards . . . .”); see also Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (arguing that a major function of formal adjudication is “to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.”).

to recognize and enforce it. In whatever verbal form the “phase-change” from morals to law is accomplished, interpretation will be required and interpretation is influenced (admittedly a “weasel word”) by prevailing moral dispositions.

We should now run through several of these distinct but overlapping meanings of “overlegalization.” Some meanings have a complex empirical core. For example, some overlegalization claims require us to ask whether certain behavior has been subjected to legal ordering in a way inconsistent with the culture’s own norms.

This is a good point at which to mention what might initially appear to be a paradox. What is the “remedy” for overlegalization? Telling the legislature or agency to undo what it has done is one maneuver. Another remedy is to state, *as a legal/constitutional matter*, that some arena of behavior has been overlegalized. If the state insists that no one may use contraceptive devices to prevent pregnancy, it has violated a fundamental liberty interest.<sup>167</sup> The state has intruded where it doesn’t belong, and this is a matter of constitutional dimension. The inquiry into norms often takes place within the investigation of “tradition” as a technique for discerning unmentioned fundamental liberty interests in constitutional law.<sup>168</sup>

Is governmental action that is inconsistent with certain important traditions really a case of overlegalization to be vindicated by resorting to the legal/constitutional notion of a fundamental liberty interest? The term is probably not precise enough to allow a definitive answer. Whatever the description, there is *some* sense of overlegalization that refers, roughly, to the law going where no law ought to go, at least in our culture. Obviously, overlegalization in this sense, and probably all its senses, will bump into difficult evaluative matters. It may be unverifiable whether legal ordering has exceeded traditional limits to legal ordering. This is especially so when cultural values and beliefs vary sharply within the social system. The issue is thus far from purely empirical. The degree and gravity of the government intrusion cannot be fixed by some objective measurement. Whether limits are exceeded—and indeed what the limits are—ultimately rests on value analysis. To make matters still more complex, any discussion of the meanings of “overlegalization” must take account of law as both reflecting and shaping cultural practices. If overlegalization has endured, community sentiments may have been altered. If so, are the relevant matters no longer overlegalized?

Before reviewing some varieties of overlegalization, two points: First, overlegalization charges are sometimes misleading proxies for what is really meant: “the wrong legal decision was made for this class of cases.” Second, overlegalization may and sometimes should be recognized and vindicated *legally*.

a. *Having legal rules (whether legislative, administrative, or common law) dealing with personal matters that should be left to private ordering.*—“Private”

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167. See *Carey v. Population Servs. Int’l*, 431 U.S. 678, 687-88 (1977).

168. See Laurence H. Tribe & Michael C. Dorff, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990) (examining the idea of tradition and its vagueness and ambiguity).

may refer to individual persons, families, groups, even communities, and perhaps to businesses and institutions of certain sorts.<sup>169</sup> Whether legal ordering has wrongly intruded into the private realm is obviously a partial function of governing moral theories, customs, and traditions. In any liberal polity, for example, the supposedly overlegalized fields can be defined very broadly—reproduction, sex, medical care, death decisions, control of mind and body, choice of life work, and so on.

There is an oddity about this: how can truly private matters lose their characterization as such by societal practices pointing in other directions? If overlegalization simply depends on practice—how one's neighbors think and act—it doesn't establish much of a limit. If things aren't overlegalized, they're "overcustomized," at least from the point of the view of the outlier who wants to be left alone. But oddity isn't fatal. We are not in a state of nature; we live, as individuals, in societies. What we leave for autonomous self-rule and what we do not is ultimately decided not by a solitary self, but by the assemblage of selves that becomes a community. Relying on natural law or moral reality does not alter the situation, for their contents again will not be determined solely by the individual claimant. Whether some form of regulation represents "overlegalization" is thus in part a matter of law and custom.

There is yet another layer of difficulty in addressing overlegalization. Most of our decisions, serious or otherwise, bear on both the public and private domains. At first glance, how one disposes of personal and household waste materials is a private concern. But final disposition is usually presumptively lodged in local government. Of course, what is thought to bear on the "public domain" varies sharply across societies. Some groups seem to regulate in certain domains of choice to a noticeably greater degree than does the United States (e.g., specifying permissible and impermissible names for children).<sup>170</sup>

More relevant to our concerns are two examples from bioethics. First, transplantation of organs or tissue from one family member to another may be viewed as intensely private and presumptively insulated from outside scrutiny. Yet the risks of intrafamilial exploitation, undue influence, or conflicts of interest are such that external scrutiny was exercised by courts from the start. The role of judicial oversight may have declined here, as it has in control of death and dying. This was to be expected. Initial rulings provided some degree of clarity and predictability, especially concerning whether transplants from live donors could even take place without risk of prosecution for mayhem or child abuse. Here again our nonparadoxical paradox appears, this time concerning the decline in judicial oversight: to preserve a domain from legal ordering may require an exercise in legal ordering stating that further legal ordering would be out of place.

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169. For more extensive analysis, see Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 5 (1992).

170. See, e.g., Tyler Marshall, *Germans' Wish Is a Command*, L.A. TIMES, Dec. 28, 1992, at A1 (discussing Germany's establishment of "quiet times" between 1:00 p.m. and 3:00 p.m.; regulation of children's names; restrictions on hours of business operation).

Second, if someone learns she has a genetic predisposition for developing a serious disorder, whose business is it beyond her own? In a liberal regime, this is a matter of private self-knowledge; its contents presumptively need not be disclosed to anyone. But that presumption may be overcome by the interests of family members who may benefit from knowing of possible genetic risks to them and their nuclear families; by prospective employers who are not anxious to invest in the training of an employee doomed to an early death or extended debilitation; or by insurers wanting to—and perhaps being legally obliged to—reduce their costs by not issuing health or life polices to persons at far greater than average risk for impairment or death. Overlegalization charges are no slam dunk here either.

b. *Vindicating certain interests through the mechanism of formal legal rights, powers, etc.*—The complaint here is about several matters: the heavy-handedness of the mechanism for pursuing the interest; the adverse effect on other interests arising from the (excessive?) focus on rights, privileges, immunities, and powers; the decline in the role of private voluntary interaction in addressing disputes; and the expression of a “message” that the interest protected by the claim of right is more important than it really is—indeed, it may be thought by some to be too lowly to merit legal protection at all.

Both of these aspects of legalization—having legal rules apply at all and formally vindicating certain legal interests created by these rules—require public or semipublic procedures.<sup>171</sup>

c. *Subjecting matters of choice that should be resolved intuitively and according to the situation at hand, instead of by rules and rule-governed resolution mechanisms.*—This third aspect of overlegalization was mentioned earlier in referring to pragmatist critiques of bioethics. It is bad enough, it is argued, to resort to rigorous deliberation using dominating abstractions. Using legal rules on top of that makes things still worse.

The nature of this branch of overlegalization is suggested by Carl Schneider, who writes that “the idioms of the law are often less apt than they might appear. They have arisen in response to needs for social regulation, but the systemic imperatives that shape the law are sometimes a poor pattern for bioethical discourse.”<sup>172</sup>

All true, as a single day in law school can convincingly show. But “less apt than they might appear” and “poor pattern for bioethical discourse” *compared to what?* If legal language is clumsy in some cases, normative discourse may be no better equipped to deal with the detachment of parts of life processes and their recombination into new forms—the basic stuff of bioethics. Having two natural mothers (gestational surrogacy) or no natural parents at all (cloning?); justifying the removal of an organ from a healthy child to give to her dying sibling, or

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171. As a possible example of overlegalization in several senses, note the controversy concerning formal discipline for supposed misconduct by small children. See, e.g., Paul Dean, *The Death of Common Sense?*, L.A. TIMES, Nov. 8, 1996, at E1.

172. Carl E. Schneider, *Bioethics in the Language of the Law*, HASTINGS CENTER REP., July-Aug. 1994, at 16, 18.

determining whether we should permit or encourage assisted suicide and voluntary euthanasia; expanding the notion of death to apply to human organisms whose bodies function spontaneously but in total separation from their permanently lost identities—these are as awkward for moral as for legal analysis.

To be sure, the very process of implanting an acute moral/conceptual problem into a legal framework is problematic—is there a constitutional fundamental liberty interest in assisted suicide? Does a disabled prisoner have a right to refuse nutrition and hydration.<sup>173</sup> These inquiries illuminate the moral issues and enrich philosophical analysis. Heuristic illumination is not the final point, however. The point, again, is that one may need formal legal ordering at the threshold in order to attenuate its intrusive grip later on: The law may and sometimes must formally vindicate the charge of overlegalization, and then withdraw until needed once more.

*d. Varying from traditional patterns of human interaction—including the formation of personal relationships based on kinship, friendship, and mating—and making them matters of formal agreement by contract or other legal/commercial devices.*—The charge that new reproductive techniques “commodify” women, children, mating, sex, and society generally is closely linked to the use of legal and commercial mechanisms in certain interpersonal transactions. Thus, legal enforcement of commercial surrogacy is compared to prostitution as an agreement that “monetizes” sex; it is also compared to the sale of children or other persons, whether as part of family formation or of slavery.

The connection between overlegalization and commodification, then, is that the former may be a causal factor in producing the latter. The imposition of legal ordering of the sort linked to mercantile deal-making does not, on this view, vindicate personal autonomy and privacy in reproduction; it instead diminishes persons and converts the exchange of services from a matter of friendship or kinship to one of “greed”—for money or children. (The epithet “greed,” of course, reflects a prior determination that legal enforcement of a transaction involving commercial exchange is inappropriate.)

*e. Finally, the idea that, within the legal field, the wrong legal neighborhood has been chosen, e.g., opting for criminal sanctions when civil or administrative sanctions would do as well or better; and opting for formal adjudication rather than informal dispute resolution.*—*Barber v. Superior Court*<sup>174</sup> might be offered as an example. In *Barber*, two physicians were prosecuted for murder. They had withdrawn medical treatment, including artificial nutrition and hydration, from a permanently unconscious patient.<sup>175</sup> More spectacular examples are Prohibition<sup>176</sup> and present-day drug bans, although the view that the wrong legal

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173. One has such a right in California. See *Thor v. Superior Court*, 855 P.2d 375 (Cal. 1993) (recognizing a fundamental common law and possibly a state constitutional right to refuse treatment, and explicitly embedding philosophical accounts of the status of autonomy into its legal argument structure).

174. *Barber v. Superior Court*, 195 Cal. Rptr. 484 (Cal. Ct. App. 1983).

175. See *id.* at 486.

176. U.S. CONST. amend. XVIII, repealed by U.S. CONST. amend. XXI.

neighborhood has been selected for recreational drugs remains controversial. One thinks also of the close monitoring of physicians who prescribe certain medicines thought likely to be abused—e.g., analgesics, and stimulants for attention deficit disorder. Those who do not view these measures as overlegalization are likely to regard failure to enact and rigorously enforce them as underlegalization. For present purposes, it is immaterial which characterization is the better one; the point is that whether something is over- or underlegalized is a function, first, of moral evaluation of the conduct in question, and second, of the parallel evaluation of promulgation and enforcement of rules.

## 2. *Further Applications to Bioethics: Law and Courts.*—

a. *Private ordering.*—The idea of overlegalization is a legitimate tool of moral, policy and legal analysis. Mistakes have of course been made by all groups, even from their own internal viewpoints, not just in selecting the contents of legal rules, but in imposing legal rules on some fields of conduct at all. The power of private ordering is sometimes underestimated, and it can work its ways while dislodging (without contravening) legal rules. As Ellickson has suggested, informal mechanisms are often used among landowners and merchants to adjust their relationships, often in ways quite different from what would be an expected result of litigation.<sup>177</sup> Nevertheless, even if “private ordering” in some form is acceptable or even preferable in some area, it would be a mistake to assume that all forms of legal ordering in the field are inappropriate. Although it may be unfortunate in some cases that a heavy-handed legal regime displaces private ordering to some degree, a legal backdrop in some form may be necessary or useful to the (now semi-) private ordering.

How do these observations bear on bioethics and, more generally, on how we are to deal with millennial technologies?

It is hard to credit the broad claim that bioethical analysis has been systematically mistaken in opting for the use of legal regimes in displacement of whatever would otherwise arise in private ordering. If it has indeed been mistaken in that way, it is no more at fault than other Western disciplines in looking so frequently to The Law. Subjecting identifiable areas of behavior and conflict to law raises most of the fundamental moral/philosophical issues that were raised during the preceding millennia. No sweeping complaint of overlegalization is likely to be borne out: the only rational way to proceed is with an area-by-area search.

The most prominent current examples of complaints about overlegalization concern death and dying,<sup>178</sup> and possibly the use of socially and technologically

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177. See ELLICKSON, *supra*, note 164, at viii (observing that “after only a few interviews I could see that rural residents in Shasta County were frequently applying informal norms of neighborliness to resolve disputes even when they knew that their norms were inconsistent with the law.”). The study focuses in part on the cattle industry. Of course, “inconsistent with the law”—with the substantive outcome had formal law been invoked—does not here mean “against the law.”

178. See PRESIDENT’S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 247

innovative reproductive methods. Similar charges were lodged early on against certain emerging organ transplantation practices. Joseph Goldstein, for example, complained strongly that the family in *Hart v. Brown*<sup>179</sup> had been required to submit its planned inter-sibling transplantation for judicial vetting.<sup>180</sup> He believed that this invaded familial privacy.<sup>181</sup> Perhaps he was right. Or perhaps he underestimated the risk of parental favoritism among siblings and the possibility of parental lack of good faith. Then again, perhaps those risks are outweighed by the cascading risks of outside intrusion.<sup>182</sup> In any case, it seems reasonable to ask why parents should have to seek state permission to preserve the integrity of their family by arranging for one sibling to save the other sibling's life, when the "donor" sibling is likely to undergo arguably only modest risk and temporary, if serious, discomfort. The question, however, is hard to answer: *Hart v. Brown* is not an univocal example of too much law.

Much the same protest was made against formalizing the decision process in medical nontreatment cases, and is now implicitly made in proposals for physician-assisted suicide, who is now permitted in Oregon.<sup>183</sup> Few proponents of physician-assisted suicide favor requirements of judicial authorization or mandatory psychological screening. But as already suggested, formal resolution of disputes arising at the beginning of an innovative practice may serve to establish patterns and to reinforce autonomy and privacy values so that recourse to legal processes will occur less often and less intrusively.

An obvious illustration of the need to compare overlegalization with underlegalization is assisted reproduction. Enforcement of surrogacy contracts is viewed by critics of surrogacy as overlegalization, which exacerbates whatever "commodifying" effects the transactions have. But this is strongly, though not inevitably, correlated with calls for legislation prohibiting, restricting or regulating the practice. Here, the critics of bioethics, most of whom oppose

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(1983) [hereinafter PRESIDENT'S COMMISSION] (stating that "[a]s made clear throughout this Report, the Commission believes that decisionmaking about life-sustaining care is rarely improved by resort to courts."). Cf. *Barber*, 195 Cal. Rptr. at 486 (holding that there is no legal requirement for judicial approval before life-sustaining treatment is withdrawn. "[In another case,] Justice Fleming observed that 'prosecution of a lawsuit is a poor way to design a motor vehicle.' By analogy it appears to us that a murder prosecution is a poor way to design an ethical and moral code for doctors who are faced with decisions concerning the use of costly and extraordinary 'life support' equipment."). (quoting *Self v. General Motors Corp.*, 116 Cal. Rptr. 575, 579 (Cal Ct. App. 1974)). As I argue in the text, however, some formal adjudications represent a plausible way to announce and reinforce behavioral norms and ideals. See *infra* Part III.G.2.b.

179. 289 A.2d 386 (Conn. Super. Ct. 1972).

180. See Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645 (1977).

181. See *id.* at 669.

182. See generally Gavison, *supra* note 169, at 1, 12, 37 (noting the objections to familial privacy arguments when the context is intrafamilial abuse).

183. See Death With Dignity Act, OR. REV. STAT. §§ 127.800-127.897 (1998) (amended by 1999 Or. Laws 423).

surrogacy, do not complain of overlegalization in the form of prohibition; they complain of overlegalization as the enforcement of surrogacy contracts, and of nonprohibition as *underlegalization*. Once again, the underlying complaint is that the legal regime protected or banned the wrong thing, not that it acted in some way at all.

b. *Overlegalization and “catching up”*.—We now need to relate matters of over- and underlegalization to the symposium’s animating idea that law and ethics must “catch up” to science and technology. Some cases seem pretty easy. Enterprises that cause negative externalities beyond a certain baseline have to pay for harms they cause. If you run a research laboratory investigating infectious agents, you have to implement serious containment and other safety measures. When dangerous new enterprises are begun and they seem to escape existing legal means of public protection, the law “catches up” with technology, in a simple sense, by acting to reduce the danger. Whether this is better accomplished by civil litigation, criminal prosecution, regulation, institutional oversight, or some combination of these routes also raises over- and underlegalization issues, but there is no reason to examine this here.

In other cases it is not so clear how law might catch up with technology. One possibility is affirmatively ordering a field in a reasonably coherent way—or so it may seem to supporters. Once again, Oregon’s physician-assisted suicide law is, to such supporters, a legal response that seizes the day and offers a clear example of gaining ground on technology. On some views, much the same would apply to bans on surrogacy, human cloning, animal gestation of human embryos and fetuses, and the construction of transgenic sentient beings. In other cases, law’s gains on technology may be via removing itself or declining to enter a given area: a community’s choice to keep law and legal process as far away as possible from a given field might well be considered a form of catching up. Repealing laws banning surrogacy or cloning would so count in my book. What is over- or under-legalization thus depends on the nature of the conduct in question, its moral assessment, the content of the substantive legal rules in place, and what procedural and remedial devices are used. For example, damages for breaching a surrogacy contract’s provision prohibiting abortion might well violate *Casey v. Planned Parenthood*,<sup>184</sup> but either way it is a far cry from specific performance, which would, by comparison, constitute immense overlegalization.

In any region of bioethics, the over/underlegalization claim can be defended only if the countervailing considerations are carefully inspected. In some cases, legalization, including formal adjudication, may promote a sound adjustment to novel problems that our biotechnological capacities bring us. Indeed, as suggested, the very imposition of legal ordering in *some* rational form is often rightly viewed as constituting moral and legal progress.

To our eyes, the “rule of law”<sup>185</sup> is essential in both directing human behavior

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184. 505 U.S. 833 (1992).

185. For analysis of the idea of rule of law, see generally Gregory C. Keating, *Fidelity to Pre-Existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1 (1993).

and doing the exact opposite—to leave behavior alone. Complaining of overlegalization is ordinarily not about rejecting the rule of law, but about the operational consequences of particular ways of implementing the rule of law. If certain forms of autonomy and privacy are constitutionally guaranteed, the rule of law requires avoidance of heavy legal regulation of personal choice. On the other hand, the rule of law also requires that, in the first instance, law enforcement officers firmly protect exercises of free speech rights against threatening protesters.<sup>186</sup>

We need law to allow people to be left alone. We now need to examine cases in which it is not obvious that classic legal mechanisms—judicial process, legislation—are necessary for a minimally adequate society. It is not clear, for example, whether “judicial supervention” is called for in certain matters of intrafamilial decision making, such as organ transplantation and death and dying. The issues merit some additional comments that bear both on these particular contexts and on the very nature of the rule of law.

c. *Rule of law via rule of courts: When legal “progress” may consist of public ordering by formal adjudication rather than either private ordering, on the one hand, legislation or administrative rule-making, on the other.*<sup>187</sup>—Government regulation in various forms—particularly formal adjudication—may suggest without establishing the influence of rational principle, whatever the subject matter. It may dispel or mask an aura of arbitrariness or anarchy and, depending on the circumstances, this may be a significant gain. This seems especially true of judicial decision making which can reinforce rationality ideals by calling upon the domain of principle to attack and manage various forms of contingency and indeterminacy. It may have other effects too—for example, offering comfort and reassurance to certain parties, relieving them of a sense of oppression and responsibility deriving from an

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186. Compare *Feiner v. New York*, 340 U.S. 315 (1951) (upholding the disorderly conduct conviction of a speaker who was threatened by a member of the audience), with *Cox v. Louisiana*, 379 U.S. 536 (1965) (reversing the breach of peace conviction of demonstrators who had drawn a hostile audience).

187. But cf. ROGER B. DWORKIN, LIMITS: THE ROLE OF THE LAW IN BIOETHICAL DECISION MAKING (1996). Prof. Dworkin critiques the law’s role in bioethics, stating that “our [legal institutional] tools for dealing with social problems posed by rapid change in biology and medicine are limited at best.” *Id.* at 18. But he also argues that “[t]o suggest that the law has no role to play in the area of biomedical advance would be both stupid and unrealistic.” *Id.* at 2. What I say here is not necessarily inconsistent with his views: He may be stressing what is absent from the glass, while I am addressing what’s in it.

See generally Schneider, *supra* note 172, at 18 (“The idioms of the law are often less apt than they might appear. They have arisen in response to needs for social regulation, but the systemic imperatives that shape the law are sometimes a poor pattern for bioethical discourse.”). But the division and rearrangement of life processes that I stressed earlier makes matters difficult not only for law, but for ethical analysis. The least-worst course, in some cases, may be to remit the matter to formal adjudication in order to achieve some degree of closure, even if imperfect and possibly transient.

"excess" of options, and so on.

There are, of course, opposing considerations. Intrafamilial lifesaving decisions pose serious value problems. But critics of formal adjudication address a particular subclass of personal value problems—ones in which they believe the issues are *so* serious and involve matters of *such* intensely personal concern that resolving them is a matter belonging exclusively to autonomous persons (or, if incompetent, their proxies) who should be able to act with their physicians without judicial interference, guided only by existing penal laws and rules of professional conduct. On this view, then, a life-and-death issue, whether in transplantation or the use of life-prolonging medical care, is a major aspect of deciding on personal medical care, which is presumptively an individual or family decision.

As we saw, however, protecting these choices may require the community's agreement that the decisional sphere is one for the individual and/or family and not the community. Indeed, the community is obliged to keep the zone of choice clear of legal interference. The private choices do not stand solitary, however. Their cumulative effects may threaten the very regime of private choice if they appear to reflect an unacceptable incidence of undue influence, coercion, or fraud. A rational community would monitor the preconditions for choice, accepting some risk of intrusions on autonomy and privacy: there are no costless ways of proceeding here. The community would also try to assure that the countervailing issues are not only not forgotten, but are acted upon in suitable cases. Important private choices thus inevitably abut the legal system.

[S]ociety has a significant interest in protecting and promoting the high value of human life. Although continued life may be of little value to the permanently unconscious patient, the provision of care is one way of symbolizing and reinforcing the value of human life so long as any chance of recovery remains. Moreover, the public may want permanently unconscious patients to receive treatment lest reduced levels of care have deleterious effects on the vigor with which other, less seriously compromised patients are treated.<sup>188</sup>

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Even for patients who do not favor such [life-prolonging] treatment for themselves, encountering some degree of resistance to their wishes is a reminder that their lives are important to others.<sup>189</sup>

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188. PRESIDENT'S COMMISSION, *supra* note 178, at 184-85 (footnotes omitted).

189. *Id.* at 108; see also *Rasmussen ex rel. Mitchell v. Fleming*, 741 P.2d 674 (Ariz. 1987).

The question of whether to refuse or discontinue treatment is not simply a medical issue to be left to the doctors; although the medical evidence is in many ways determinative, the final decision incorporates a range of ethical, moral, and societal values which should not be left solely to doctors, family members, or representatives of the court . . . Such decision making requires the final validation—not necessarily by adversarial hearing—and the detached and neutral inspection of a judicial officer, accountable to

Probing the nature of the value reinforcement (or attenuation) worked by judicial intervention may help explain *both* why we resort to courts *and* complain about doing so and will probably continue to do both.

We learn from what we see, and what we see embraces the operation of institutions and practices. Empirically confirming this is difficult and often impossible, but the claim is nonetheless plausible because it is founded on elementary aspects of human learning. We are entitled to rely on these basics, despite the mass of variables that hinder study.<sup>190</sup>

This inquiry into learning effects concerns, at the start, legal ordering *as* legal ordering, without particular reference to its substantive content. In particular, to take a somewhat anthropological view, it is about the role of formal adjudication as a visible mechanism for overtly principled decision making.

This is not meant to be an opaque, empty procedural orientation. I am not suggesting that “just letting the courts figure it out, however they do it” can regularly provide a satisfactory justification of various forms of legalization. Order for order’s sake is not the point. But rule-governedness via formal adjudication transcends matters of particular substantive content, and I proceed on that understanding.

One might think, however, that the rule of law, via courts or otherwise, is ill adapted for use in conceptual regions dominated by heavy indeterminacy. Perhaps talk about courts invoking the realm of principle makes little sense where matters are so chaotic and uncertain that no principles are, or could be, available. To say otherwise would be dishonest, or so one might argue. The life/death choices involved in transplantation and non-use of life-prolonging medical care are well known for resisting clear resolution.

Yet however paradoxical it sounds, resort to a formal body bound to deal with principle as best it can may be useful precisely *because* the principles at stake, as applied to major value issues, appear to resist consistent, determinate application, and perhaps even identification. Law as the reign of principle (not just naked process) whose nature is intuited by special parties may be of central importance where there is general normative confusion about basic values.<sup>191</sup> An

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the law, and therefore to the public.

*Id.* at 692 (Feldman, V.C.J., concurring). The court upheld a trial court’s conclusion that the patient’s best interests were promoted by do-not-resuscitate and do-not-hospitalize orders entered on the medical chart. *Compare In re Quinlan*, 355 A.2d 647 (N.J.), cert. denied, 429 U.S. 922 (1976) (suggesting circumstances where judicial review is unnecessary), *with* Superintendent of Belchertown State Sch. v. Sainkewicz, 370 N.E.2d 417 (Mass. 1977) (disagreeing with the *Quinlan* court).

190. Cf. Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 820-21, 824 (1994) (stating that “[i]f the law wrongly treats something—say, reproductive capacities—as a commodity, the social kind of valuation may be adversely affected. . . . It is appropriate to evaluate the law on this ground. . . . I do suggest that the expressive function [of law] is part of political and legal debate.”).

191. Despite indeterminacy, there may be no general *perception* of confusion. This may be

arena apparently resistant to law because of interminable, insoluble value collisions and murky facts may be a prime candidate for the rule of law precisely because of these conditions.

Conflict, indeterminacy, paradox, and contradiction involving major values thus seem both to call for and resist the rule of law as implemented by courts. The parties at the bedside, some of whom may be affected by fear of liability as well as by moral puzzlement, may invite the judicial rule of law even though this impinges on intensely personal matters. The resistance of the problem to *their* reasoned analysis does not, for them, exclude courts; it *calls* for courts to penetrate the mystery, not just to apply an (imaginary) algorithmic science of law. Perhaps this view of courts is excessively romantic, but it is hard to deny some degree of "charismatic authority" based on a belief in their mastery of matters too deep for the untrained. This is not, however, an "oracular" view of courts, at least on the primary meaning of the term. Courts are not primarily viewed as transmitters of messages from another realm.<sup>192</sup>

Still, the vision of law as replacing chaos with principle fits uneasily with the view that principled reasoning is often at least partly indeterminate, and the fit is even worse when we address the more numbing forms of indeterminacy. The apparent paradox here is that rational principle may fail us when we need it most. Easy cases need the courts less than hard cases do, but if hard cases involve intractable indeterminacies, rational principle alone may not yield an acceptable result, thus leading some to conclude that the use of courts is irrational. On this view, courts are especially inappropriate when their services are especially important.

Yet, they are not inappropriate, because we (or some of us) see courts as having special insight into principle—an insight demanded when the principles defiantly resist the tasks laid on them, and when the issues seem to test major values unwilling to provide answers. Exactly how is it that X is/isn't a Y for purposes of Z? How is it that inaction is/is not killing, that affirmative action violates/promotes "the" ideal of equality, that forced medication of the mentally disordered does/does not promote their autonomy? Courts know, so it is said. They have access to "the normative patterns or order revealed or ordained [by them]," as Weber put it.<sup>193</sup> But if they do know, they know something

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due in part to institutions such as courts. For an account of why lawyers and judges might be useful in contexts when important classificatory schemes are under assault, see Michael H. Shapiro, *Lawyers, Judges and Bioethics*, 5 S. CAL. INTERDISC. L.J. 113 (1997).

192. Perhaps the appropriate "location" of courts is somewhere between mastery of automobile repair (most people can learn at least some of the rules with appropriate training) and mastery of theoretical physics (most people cannot get beyond whatever serves as first base). If one believes in objective moral reality, one *may* also believe that it takes special ability and training to divine what it is, and that not everyone can learn to do it.

193. MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 328 (A.M. Henderson & Talcott Parsons trans., 1964). The full description reads: "Charismatic grounds—resting on devotion to the specific and exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by

mysterious.<sup>194</sup> After all, does anyone really have a nifty decision procedure that always fills in the non sequitur between the statement of the general rules and the conclusion by identifying the true and correct premises? Pursuing “reflective equilibrium” or “coherence theory” or “dialogue”<sup>195</sup> is fine for awhile, but these processes do not take you all the way to closure and are easily tossed around as academic buzzwords. If it were otherwise, we would often have the resolution we sought in the first place, instead of being caught in a process-substance cycling or some other limbo.<sup>196</sup> There is a normative leap to be made. Trying to find it as a deductive consequence of other propositions leads to infinite regress or a search for stopping points. But those stopping points are themselves mysterious, and not clearly identified through moral intuition or revelation (at least in “hard” cases). Reason itself is laced with mystery. Some mechanism is needed to find an end point.

High indeterminacy, then, does not necessarily make the matter unfit for courts.<sup>197</sup> It may indeed make courts the only possible decisionmaker, for they enclose the mystery of the normative leap within the forms of reason, thus transforming the contingent into the unquestionable.<sup>198</sup> Law as formal adjudication cannot be limited to some supposed domain of consistent principles;

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him (charismatic authority).” *Id.* at 328. See also *id.* at 358-63 (discussing charismatic and other authority); MAX WEBER, 2 ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 760 (1978) (stating that “ . . . innovation in the body of legal rules may also occur through their deliberate imposition *from above.*”) (emphasis in original; footnote omitted).

194. There are objections to this use of “mysterious.” It connects reason with magic, which is precisely one of the things with which it is to be contrasted. But if we do not know how to fill in all the premises, the appearance of someone else doing so seems to suggest “mystery.”

195. JOHN RAWLS, A THEORY OF JUSTICE 48-51 (1971) (explaining reflective equilibrium); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1240-43 (1987) (coherence theory); BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 43 (1980) (dialogue).

196. Here is what I mean by “process-substance cycling”: An absence or failure of substantive criteria for decision making suggests reliance on processes for identifying decision makers in a procedurally appropriate manner. They can then decide how to deal with the problems at hand. It is therefore tempting to finesse substantive problems by relying on procedure, but this is itself an unreliable process. The ultimate decisionmakers must ask themselves how to decide, and are likely to notice the lack of guiding standards and seek outside assistance from their creators and others. If their creators are consulted, they will still have no criteria, and this is at least partly why they delegated the decision making in the first place. The matter is thus sent back down. Thus the phrase “process-substance cycling.” Moreover, the very criteria for selecting the decisionmakers are likely themselves to be contested, in part because of the difficulty of selecting and linking their respective characteristics to the nature of the problems defying reasoned resolution. This can torpedo the very effort to rely on “process.”

197. One might think otherwise, given doctrines of nonjusticiability in federal constitutional law and elsewhere, but the issue is not to the point here.

198. See Sally F. Moore & Barbara G. Myerhoff, *Introduction: Secular Ritual: Forms and Meanings*, in SECULAR RITUAL 3, 22 (Sally F. Moore & Barbara G. Myerhoff eds., 1977).

its function is also to deal with the “unprincipled,” in a way that makes it seem principled. Courts offer the contribution of open, principled adjudication to value reinforcement. Judicial resolution may attack several sources of contingency<sup>199</sup> in lifesaving and help dispel any aura of conflict of interest—say, parental favoritism among siblings that leads to imposing unjustifiable risks or burdens of care on some to benefit others.

If life-affirming values are sufficiently important, then resolving the meaning of “life-affirming” and testing pro-life values against other values in particular cases requires reasoning, not arbitrary or random action. This is one reason for going public with disputes that many prefer to keep private. To render lifesaving noncontingent, the decision favoring it must be seen as the product of right reason. Reducing the appearance of arbitrary contingency in lifesaving by the use of reason thus can preserve favored values under siege: individual and familial autonomy and privacy. Though other techniques dispose of disputes, they may reduce contingency less if they appear ad hoc or arbitrary; they produce no basis for future understanding, nor do they inspire confidence that, say, lifesaving is preeminently valuable. Thus, to fail to apply reason is to say the issue is unimportant.

This does not fully answer the charge that applying reason through judicial oversight intrudes on what seems to be an intensely private matter. Moreover, the outcome may seem all the worse to the losers because they lose on the merits. It is a striking feature of death and transplantation decisions that they seem at once to call for both private decision and public scrutiny. *The very reason for the personal importance of the decision is a prime source of the community's interest in it*—the continued existence of one of its members and, by implication, all of its members, present and future.

Despite the strong claims for noninterference, the calls for judicial application of principle remain. Principle tells us where to find the edge we teeter on when reason seems to run out. Not just any edge will do. When we reach the edge, we have judges with us—masters of the normative leap, a leap the untrained or uninsightful cannot make. In many cases, as we saw, indeterminacy, autonomy, and privacy do not necessarily make a matter unfit for courts. On the contrary, they make courts, or some other entity openly using reason, the least worst decisionmaker because the indeterminacy must be attacked in a principled way in order to maintain a value structure.

Of course, the whole project may backfire, making things seem even more arbitrary and confused. Rulings widely perceived as unjust or lunatic damage the integrity of the adjudicative institution and its mission. If this risk inspires us to move private choice underground, we return to the specter of contingency—a world in which life is so little valued that we trust it to a set of unconnected private battles that may or may not form a coherent pattern of life or death decisions. With invisible decision processes having visible outcomes (say, secret meetings by shamans in smoke-filled rooms), we do not know if life and pro-life

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199. For explanations of the meanings of “contingent,” see Shapiro, *supra* note 137, at 738-39.

values have been compromised by improper wishes for private gain, by a darts game, or by witchcraft, rather than by slogging through the claims of beneficence, autonomy, and so on, in promoting life and family. How important can life and life's sanctity be? Isn't life something important enough, and easily enough eroded, to merit noncontingent support through the consistent effort to apply principle?

And what, finally, of autonomy and privacy? Legal nonintervention generally and judicial nonintervention in particular seem to affirm privacy and autonomy. When regulators choose not to regulate, the ideal of personal choice is reinforced. The indeterminacy created by nonregulation is just what is needed to promote autonomy, or so one might argue.<sup>200</sup>

But suppose judicial pronouncements favor autonomy and privacy, as many now do in both the transplantation and the death and dying fields.<sup>201</sup> (There are of course cases in which it is not clear how far autonomy is favored or disfavored. *Cruzan v. Director* is one of these.)<sup>202</sup> Do such formal statements promote these values more than judicial nonintervention—no courts saying anything? (Recall that nonintervention here refers not to a negative judicial decision, but to no judicial participation at all.) A reasoned view that autonomy somehow prevails in a conflict with other values may reinforce it to a greater degree precisely because the decision is a product of special insight applied by public, authoritative deciders, sensitive to their own limitations. Yet leaving the matter to a court that might have decided against autonomy cuts the opposite way.

Legalization can obviously not only promote ideals of reason, autonomy and privacy, but communitarian interests as well.<sup>203</sup> A court is after all, a community product. This in turn may promote a rationality ideal because the image of a

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200. If the sort of autonomy endorsed is "familial autonomy" or "parental autonomy," it is hard to say just what values are being vindicated, particularly when there are intra-family clashes. There is, in effect, a problem of specifying the "unit of autonomy." Cf. *Parham v. J. R.*, 442 U.S. 584 (1979) (upholding parental decision to place child in mental health facility after psychiatric review).

201. See generally *Curran v. Bosze*, 566 N.E.2d 1319 (Ill. 1990) (denying a request for bone marrow testing of children to determine if they were compatible with their half brother); ALAN MEISEL, THE RIGHT TO DIE 83-84, 262-63 (2d ed. 1995).

202. See *Cruzan v. Director*, Missouri Department of Health, 497 U.S. 261 (1990). Although there is some confusion about this, the Supreme Court did recognize or concede (however grudgingly) a liberty interest in competently refusing medical treatment. This was not assumed *arguendo*. The problems for the Court arise when the patient is incompetent and where artificial nutrition and hydration—which some believe are not "medical treatment" but forms of basic sustenance—are involved. Missouri had required that the evidence be clear and convincing that withdrawal of care would be consistent with Ms. Cruzan's wishes while she was competent. See *id.* at 265. The Missouri Supreme Court thought the evidence inadequate, and the resulting judgment was upheld by the U.S. Supreme Court. See *id.*

203. Again, no sharp divisions here; the community's interests include promoting the autonomy and privacy of its members.

central decider—the community—may suggest the idea of coherence, consistency, and caring. This communitarian aspect of judicial intervention is easily understood: “by assembling, and ultimately by sharing responsibility for the decision, they [the community members] once again bind themselves to one another.”<sup>204</sup>

But here too, the messages are mixed. Consider medical nontreatment. It may well be that resorting to courts affirms the community by assigning it important decisions, and also affirms certain specific values by having the community, via the courts, endorse them. But a decision favoring nontreatment can be taken to exclude the patient from the community, and so seems to impoverish it: the patient is “thrown away.” And where messages are mixed, many of them will get lost. Further, the perceived connection between courts and community (or certain communities) may be weak. Courts may be viewed as intruders, alien to one’s prime community.

It is thus unsurprising that we resort to courts to make death-and-dying and other decisions *and* regret the need to do so. There is no inconsistency here. Using courts and grumbling about it reflects the underlying value conflicts, the fear of indeterminacy and of exposing it rather than resolving it, and perhaps our dim awareness of the varying communicative impacts of using or not using courts. Doing X may affirm some values, and complaining about doing X may affirm some conflicting “oughts.” Perhaps sometimes we ought to do both, and indeed we do.<sup>205</sup>

#### *H. Bioethics as We Know It Ratifies Establishment Practices and Values and Fails to Question Foundations to a Sufficient Degree*

Seedhouse, writing about health care rationing, says that “bioethics accepts uncritically the context which generates the problems it tries to deal with.”<sup>206</sup> This is not so. The bioethicists I know and/or whose works I read are largely a self-selected group with an orientation toward “out-of-the-box” thinking. Perhaps Dr. Seedhouse has encountered a sample with sharply different characteristics. I do not plan to do any empirical research on this. I assume that “accept[ing] uncritically the context . . . ” is a species of automatically supporting establishment values. Now, if a discipline expresses near universal preference for every significant aspect of the status quo, what is the problem? If the discipline’s approval was automatic, their decision making process was unreasonable and possibly dishonest. If it was not automatic and its outcomes remain widely disputed within the field, then the complaint about “secular

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204. Sally Falk Moore, *Selection for Failure in a Small Social Field: Ritual Concord and Fraternal Strife Among the Chagga, Kilimanjaro, 1968-69*, in SYMBOL AND POLITICS IN COMMUNAL IDEOLOGY 109, 121 (Sally Falk Moore & Barbara G. Myerhoff eds., 1975).

205. See Michael H. Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. CAL. L. REV. 1555 (1988).

206. David Seedhouse, *Why Bioethicists Have Nothing Useful to Say About Health Care Rationing*, 21 J. MED. ETHICS 288, 291 (1995).

establishmentarianism" is better understood as the critic's adverse judgment about the existing value system, or about a particular outcome, or perhaps as a complaint that the establishment is pathologically risk averse in its resistance to change.

Still, the claim of uncritical acceptance of "context" is not utterly vacuous. Some of the criticisms of technologically and socially assisted reproduction ("TSAR") suggest that it is an establishment plot to promote existing conditions, such as patriarchy, the objectification of women and children, and the technological imperative generally. Assuming *arguendo* that these are indeed dominant establishment institutions, then anyone who endorses or fails to oppose TSAR is ratifying the status quo.<sup>207</sup>

There are several facets to this criticism of support and ratification of prevailing establishment sentiments. One is that bioethicists ought to view themselves as part of the "loyal opposition" and should regularly question the status quo—its bottom-line answers, its rules of justification, its processes, and so on—and they do not do this enough. This is the least cutting objection. The loyal opposition idea seems plausible, but I think a loyal opposition already resides in the discipline. I see no evidence that the discipline regularly defers to "What Is" via some conservative reflex. Moreover, in any deliberative literature, many, if not most writers will assume a Devil's advocacy of sorts to test their own claims, some of which may or may not concur with then-current legal and ethical terrain.

Still, such questioning and advocacy may not go far enough for the critics because the questioners and advocates may really accept the rules, principles or outcomes in question. How far up the crooked, *n*-dimensional ladder of abstraction must one go in questioning the status quo in order to escape the charge of knee-jerk establishmentarianism?

A stronger claim may be that establishment institutions, or some major parts of them, are badly flawed—that too many bioethicists buy into them—and that the right moral, conceptual and legal infrastructure should be imported into a new establishment. How many is too many? This is just another way of "critiquing" bioethics without expressly noting one's bottom-line disagreement with many of its practitioners—whether it is a disagreement over procedures, standards, or whatever. I have already dealt with this, saying that such a critique is wide of the mark unless some infirmities can be shown to characterize the literature, the judicial decisions, the legislation, and whatever else we include in the "discipline." The establishment in fact is far from monolithic and is continually under amendment.

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207. See the description of similar and related views in BARRY R. FURROW ET AL., *HEALTH LAW* 834 (1995) (describing the anti-surrogacy arguments made by others who claim that "such a change in the nature of the reproductive processes dehumanizes the surrogate mother and harms the relationship between the child and the mother. This leads to the commodification of babies, who are treated as a market commodity not substantially different from sofas, pork bellies, or anything else that can be traded for money."). As I argue here and elsewhere, this extravagant idea has no serious empirical or conceptual support.

Another element of the complaint about pro-establishmentarianism may be that, whatever outcomes are sanctioned or recommended, *foundational* values are not called into question in reaching these outcomes. But this position is quite unclear. First, what are the foundational values? Unless there is some realm of dark ethical theory that we have yet to discern, these values are captured by high-order abstractions that are familiar to us all. I am not sure that any given list is exhaustive, and I am also not sure that the membership listings all reflect the same level of abstraction so that comparisons are coherent. But the usual suspects are utility, justice, fairness, equality, autonomy or its cousins, liberty and freedom, and possibly, duty, responsibility, and virtue.

What does testing foundations consist of in this context? Should we question the ultimate normative importance of the values? By hypothesis, these values are basic. They are the criteria for normative judgment, and there is nothing beyond that which normatively validates *them*. Sooner or later, one stops where the crooked ladder seems to end; there is no infinite ascent or regress. Some values are viewed as so basic that all or most of the others are considered derivative. There are utilitarians who, in a sense, reduce all other value candidates to utilitarian foundations. Justice is promoted because it serves utility, not justice. Vindicating justice claims is simply a method of promoting utility. Is this the problem—that most bioethicists are utilitarians? It doesn't seem so. Even if most bioethicists are utilitarians, bioethics would still not be infirm unless the utilitarians never even addressed competing moral theories and dealt with all issues in a purblind way. Where is this occurring as a consistent practice? In academics, at any rate, while there are a fair number of utilitarians, there are not a lot of dumb ones—driven maybe, dumb, no.

As for affirmatively ratifying establishment values such as autonomy, several questions arise: Do too many persons defer too strongly to autonomy? What forms of autonomy? In what areas of medical technology should autonomy be less respected? In what spheres does it have more than equal time? There may indeed be some who have over-emphasized patients' short-term autonomy to resist treatment as opposed to their long-term autonomy in the form of eventual greater functionality, and so resolved doubts against required treatment for mental disorders. On the other hand, there is no doubt that resolving doubts the other way poses serious risks of abuse and of expansion of involuntary treatment. There are those who perhaps too easily take widespread patient concurrence in treatment as undue influence and thus as impaired consent. But I see no objectionable dominance of the one group over the other.

I suggest, then, that there is no overriding "autonomy is everything" principle dominating the field. Even if there were, there might be wide variation over specifics because of the competing internal strands of autonomy: opportunity to pursue preferences; self-direction; and its underlying presuppositions, including competence, authenticity, and voluntariness.

Take, for example, a complaint that because autonomy as a value is *e pluribus unum*, it should not get more than its fair share of attention. Perhaps there was an initial failure to adequately draw out countervailing considerations and preconditions. If this indeed occurred, it was quite a while ago, and, according to careful historical analysis, not everything can be done in a day. But

whether or not any value gets more than its fair share of attention or is short shrifted is certainly not a purely empirical question. The central question concerns moral analysis of the status of autonomy (or of any other value under review). The significant attention that it continues to draw might indeed be the attention it deserves, all things considered.

So, does bioethics, in fact, inappropriately ratify the status quo because “it” thinks autonomy outweighs equality or some other value in more circumstances than critics do? Perhaps autonomy-lovers have misread the official metric (the standard autonomy unit is in a sealed container in the Smithsonian). This reflects a fundamental moral dispute, however, and it is not best described by saying that any of the protagonists holds an inherently flawed position. Autonomy mavens do not have a monopoly on bioethics, nor do egalitarians, partisans of justice and fairness, utilitarians, Kantians, positivists, pragmatists, and so on, at any level of generality.

Finally, this “establishment” argument may be couched in a call for a change in paradigms. The critique may be founded only in part on disagreement with outcomes. It may be an attack on reasoning paths thought to appeal to the wrong exemplars and analogies. Different routes may lead to the same final destination, but if routes are good for more than one trip, they must be sound independently of any particular result.<sup>208</sup> This requires no separate discussion, however. It is included in the earlier account of general discussion about the nature and content of the dreaded secular establishmentarianism.

I mention only briefly the position that the phrase “buying into the establishment” suggests conflict of interest or rigid partisan agendas. The point bears mentioning from time to time, but it is of minor consequence here. Clinical researchers must disclose whether they are on the payroll of a manufacturer of the drug, biologic, or device being investigated. Bioethicists may sometimes encounter conflict of interest problems, but the scale is quite different. They must disclose who has retained them, if anyone, and the fact that they are being paid, and possibly how much. If they are designated spokespersons for some institution, this must also be disclosed. Being devoted to a theoretical or ideological stance, however, is different. People who are loyal Kantians do not presumptively have to disclose this, and in any case, their condition will soon become apparent. Not that there is anything wrong with being devoted to Kant; I used to set my watch by his daily walks.

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208. See generally P. Lance Ternasky, *Salvaging Moral Progress*, 49 PHIL. EDUC. 126, 128 (1993) (“For those arguing for [moral] progress, it comes as no surprise that the dominant ethical theories often disagree dramatically in principle but converge when making application to actual cases.”).

### *I. Bioethics Bears the Smell of the Lamp<sup>209</sup> and Offers No Practical Guides*

The claim that bioethics offers no practical guides is extremely weak. For one thing, the discipline—and *any* branch of thought—must deal with abstractions. Here, they are in the form of rules, standards, principles, maxims, bromides, and conceptual constructs such as hypotheses, theories, conjectures, thought experiments, analogies, paradigms, and so on. A given professional contribution may be too abstract to provide practical guidance down to the final decision level, but a discipline without such contributions is likely to bear foundational deficiencies beyond what one would normally expect. To the extent that the critical claim is a complaint that bioethics engages in unnecessarily extended reflection and deliberation, it should with due reflection and deliberation be dismissed.

Second, the complaint about the lack of practical applicability is closely related to the complaint that few or no answers are forthcoming, a matter to which I earlier referred. In many cases, it is, in principle, impossible to arrive at a unique right answer to which all contending parties are likely to assent; this is the nature of the abstractions under siege.

Finally, the literature contains many contributions by persons who address themselves to the clinical or technological setting and suggest particularized factors and variables that the principles may or must consider.<sup>210</sup> This may even offer bottom-line answers in various cases. Complaining that there remains a dearth of clear and convincing answers, however, is likely to reflect a deep misunderstanding of what ethical, legal, and policy analysis is.

### *J. There Is No Unified Theory Underlying Bioethical Analysis and Problem Solving<sup>211</sup>*

If a commentator offers a theoretical contribution that purports to be sound, coherent, and useful, but whose theoretical underpinnings are substantially in conflict *inter se* and no discussion of their possible reconciliation is offered, then one may rightly complain of a certain intellectual disarray, if not of fatal errors. This is one frequent criticism of principlism.<sup>212</sup> However, the lack of a truly

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209. Cf. *id.* at 126 (describing a world of incommensurability that results in contradictory ethnocentric systems and stating that “if this is the most we can expect, then the interminable debates between divergent theoretical camps may be principally viewed as entertainment for academics.”).

210. See generally ALBERT R. JONSEN ET AL., CLINICAL ETHICS: A PRACTICAL APPROACH TO ETHICAL DECISIONS IN CLINICAL MEDICINE (4th ed. 1998).

211. See generally Clouser & Kopelman, *supra* note 42, at 124 (discussing the lack of a unified view of bioethics).

212. *Id.* See also K. Danner Clouser & Bernard Gert, *A Critique of Principlism*, 15 J. MED. & PHIL. 219 (1990). The authors state that no argument “exists to support the role of principles in the hierarchy they [Beauchamp and Childress] propose,” *id.* at 231, and that “with principlism, disagreements are often not only unresolvable, but one often does not even know what the basis of the disagreement is or what changes in facts would produce agreement.” *Id.* at 234. Clouser and

unified theory that provides clear answers in every area is not a fatal error in bioethics any more than in other fields. The error, quite the contrary, would be to think that such a theory is possible.

#### K. So Is Bioethics Broke or Not?

I do not see that bioethics needs, or is undergoing, paradigm shifts. This is not a claim that everything in the field is to remain the same for eternity. Nor is it a claim that there can be no “progress” or useful new paradigms or lines of thought. But to say that we should attend more to responsibility and duty than to rights, or to think of community needs and not just autonomy needs, or that law is over- or under-present, is not necessarily an attack on foundations or existing paradigms. It may be a shift in emphasis in recognition of considerations that, in any field, may be underdeveloped for a time. Conceptual systems do not spring complete from any individual’s or discipline’s heads. There is also the usual reservation that whether prior analytics are overdone or underdone may rest less on comparative time sheets than on moral and policy differences.

Let us draw out this idea of assigning differential “weights” to liberty claims as against community claims. The very idea of assigning weights to competing considerations and then “balancing” them *itself* reflects a dominating paradigm, not only in constitutional law, but in other fields of law and in moral reflection. In many arenas, balancing is not simply a useful paradigm, *it is a core of rationality*. It is an effort to judge the worth of a course of conduct by considering its good and bad aspects and impacts—whether we speak of them as intrinsic or instrumental, or refer to consequences, or to value or duty impairments, which are also consequences of a sort.<sup>213</sup>

It is too loose a use of the word “paradigm” to say there is a paradigm shift in withdrawing weight from, say, a liberty claim, or adding weight to a community claim. Indeed, such “interior” shifts within a conceptual argument structure are often *contrasted* with paradigm shifts, although, as ever, the

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Gert add that “[w]e believe, in the sense given to ‘principle’ by [William Frankena] and by Beauchamp and Childress, that for all practical and theoretical purposes there are no moral principles.” *Id.* at 235. They also urge, more generally, that “it is a moral theory that is needed to unify all the ‘considerations’ raised by the ‘principles’ and thus to help us determine what is appropriate.” *Id.* at 228.

213. This general formulation belongs both to consequentialist and nonconsequentialist theories. Rational moral reflection is not confined to balancing “utiles”; one “balances” in deciding whether to break a promise to one person or satisfy a conflicting obligation, despite the perils of incommensurability. Thus, comparing value gains with value losses is not characteristic solely of consequentialism. Conflicting duties can be compared and balanced—so also with conflicting rights and conflicts between duties and rights. Cf. NOZICK, *supra* note 134, at 28-29 (discussing “the utilitarianism of rights”).

On incommensurability, see generally Richard Warner, *Topic in Jurisprudence: Incommensurability as a Jurisprudential Puzzle*, 68 CHI.-KENT L. REV. 147 (1992); Sunstein, *supra* note 190.

distinction is blurry edges. Nevertheless, the call for reassignment of weights reflects moral disagreement at an important if non-cosmic level. Tricking a clinically depressed but technically competent person into taking antidepressants may, for one evaluator, vindicate “true” autonomy because it maximizes long run opportunities for self-directed rational pursuit of one’s settled, authentic preferences. For another, it is an exercise in private or public paternalism and is never justified. This is a substantial dispute,<sup>214</sup> but if one switches from the one view to the other, this is likelier to result from re-valuing the competing aspects of autonomy, not from an earth-shattering change in moral perspective. A field is not necessarily reinvented by switching sides—although one could speak of “sub-paradigm” switches: from long run to short run, “future self” to present self, more paternalism to less paternalism. Whatever these switches are called, however, establishing a need for them does not establish that the discipline is broken. The same holds true even if it is shown that the field has too many hard-nosed libertarians, or too many equally hard-nosed paternalists.

Reassignment of weights generally reflects both factual and moral/conceptual matters. Thus, if we are told by bioethics’ critics that we have been assessing, weighing, and balancing *the wrong things*, then *what are the things missed or to be replaced?* On the other hand, if we are told we have been testing the right things after all but *assigning the wrong weights*, or that we have been *using an inaccurate scale or balancing mechanism*, how then are these errors to be corrected?

So, rival views concerning the identification, ordering, weighing, and balancing of values are one thing—significant, but not mind-numbing. On the other hand, matters are far more serious if the deficiency is failing to identify the material moral issues, or failing to analyze them and instead relying solely on mental/intestinal sensations of “repugnance,”<sup>215</sup> rejecting weighing and balancing and instead applying, absolute rules at a high level of generality. If these latter failures were endemic to bioethics, I would concur with the critics’ final conclusions and calls for repair, though probably for different reasons and contemplating different kinds of remedy.

What, then, drives the critique of bioethics?

1. *Disagreement with Outcomes.*—In significant part, it seems to be disagreement with bottom-line conclusions, whether with a commentator’s conclusions, a court’s rulings, a legislature’s enactments, an ethics committee’s recommendations, and so on. But this is not an adequate basis for an ascription of brokenness. Reflective critics are likely to inspect the inputs that yielded the output, presuming that bad conclusions stem from bad thinking tools and techniques.

2. *Inappropriate Methods/Concepts of Analysis and Valuation.*—One can claim that any given outcome reflects a wide variety of mistakes. The outcome may derive, for example, from a mistaken value-ordering within a moral

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214. See generally Michael H. Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237 (1974).

215. Kass, *supra* note 39, at 17.

hierarchy, but this too does not automatically mean that the system of thought embracing a particular ordering is seriously faulty, nor that the ordering itself is incoherent. Far more seriously, it may also derive from completely excluding important considerations, rejecting crucial paradigms, failing to credit major perspectives, or from conflicts of interest. If so, something is indeed broken. This is just what we would say, for example, if health care commentators took no account of the role of patient preferences or of patients' exclusion from health care services, or if they assigned zero value to community interests, or completely discounted differences among racial, ethnic, gender, and other groups.

The critique thus implicitly embodies either a bare objection to an outcome or a moral or conceptual dispute. The latter sort of debate often includes claims that one's opponents "don't get it": they have missed material moral issues, are misled by the wrong paradigms and analogies, are mindlessly rooted in the establishment, etc. I think this is generally not the case. Beyond its rhetorical usefulness when vented by ideologues, insisting that "they don't get it" is often just a misleading way to beg the question.

#### *L. A More Suitably Limited Critique of Bioethics Which, if Implemented, Would Clearly Count as Some Progress*

1. *Loose Talk.*—This Article is not a whitewash of bioethics. There are matters to complain about. I referred earlier, for example, to the questionable quality of debates on various issues.<sup>216</sup> One can also complain that there is a tradition in some areas of bioethics to buy into *sub-establishments*—e.g., the long-standing opposition to some or all TSARs.<sup>217</sup>

The sub-establishment themes are that TSARs promote male domination, professional domination, objectification of particular women, of women generally, of children, and perhaps everyone and everything within range. Value theories are not identified clearly, or if they are, are largely undefended; inferential leaps and conclusory arguments carry the day.<sup>218</sup> Despite all these deficiencies, however, the anti-TSAR articles, judicial decisions, or commentaries may remain in other respects insightful, useful, and, most importantly, sources of important perspectives that others may miss. I cannot recommend that a part of bioethics be temporarily shut down for repairs just because it is, more than not, mistaken in its judgments about assisted reproduction.

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216. See *supra* Part I.

217. This point exhibits the dangers of arguments about ratifying or buying into the establishment. If you attack the establishment consistently over an extended period and gather a substantial, nontransient following, you have created yet another establishment or sub-establishment of sorts. This line of criticism of bioethics does not seem well thought out. The characterization is largely a tendentious way of labeling opposing views.

218. For expansion of these views, see generally Shapiro, *supra* note 47; Shapiro, *supra* note 66.

Consider, for example, Annas's view on certain modes of assisted reproduction:

Both clinics and courts like contracts, because they seem to put private, procreation-related decision making in the hands of the married couple and permit the courts simply to interpret and enforce voluntary agreements. [1] The problem, however, is that much more than contract law is at stake in these cases. The courts are not simply affirming the contents of a contract but are implicitly making profound and wide-ranging decisions about the status of embryos, the interests of children, and the identification and responsibility of their parents. [2] The inadequacy of contract analysis in this area can be seen by the fact that no court has ever forced any person to fulfill the terms of a surrogate-mother contract, a custody contract, or a marriage contract by requiring that the parties be bound by the contractual terms regardless of their current wishes or the best interests of the children involved.<sup>219</sup>

There is much to learn from these remarks, and much to lament.

Concerning [1], the view that the courts, in enforcing contracts, are implicitly (it seems pretty explicit) deciding serious value issues: embryo status, children's interests, and parental identification. This is not generally an *objection* to contract litigation (or any other sort of litigation); it is one of the *rationales* for formal adjudication. The problem, for some, is that the issues were decided the wrong way, not that they were decided at all, and/or that the underlying transactions should never have occurred. *York v. Jones*,<sup>220</sup> for example, dealt with cryopreserved embryos as property, more specifically as the subject of a bailment contract. Perhaps some think the case should have gone the other way by saying it was contrary to public policy to view embryos as "property" in the sense that they are subject to someone's right to control. This too would have been a decision about embryonic status, although a pretty lame one that gravely impairs procreational autonomy.

Claim [1], then, is 180° off, at least in some cases. Every time a contract (or severable contractual term) is upheld or invalidated because of or despite public policy, a common law court is necessarily making value-laden judgments. These considerations are not "more than contract law," but an integral part of it. It is thus not apt to say "more than contract law is at stake," as if the law of contracts were a discrete, autonomous region having little connection with the major policy issues of the day. "Contract law" cannot be dismissed as some separate irrelevancy: it is intrinsic to how we live. "A matter of contract" is sometimes

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219. George J. Annas, *The Shadowlands—Secrets, Lies, and Assisted Reproduction*, 339 NEW ENG. J.MED. 935, 936 (1998). The case references are to *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998) (a gestational surrogacy case) and *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) (concerning custody and use of frozen embryos after divorce).

220. 717 F. Supp. 421 (E.D. Va. 1989) (ruling that genetic parents of a cryopreserved embryo had a contractual right to remove it from the storage facility so they could try implantation elsewhere).

used as an epithetic claim (as in “love is not matter of contract”), but there is no *reductio ad absurdum* one can make here; *there is no inherent contradiction or incoherence in applying contracts to certain matters of intimate association or personal choice*. Which ones are appropriate for contractual arrangements and which ones are not is contested, but the answers are not obvious. The error here is to reduce the idea of contract to everyday mercantile matters such as purchasing appliances. “Contract law” is thus used as an epithet or rhetorical flourish. But contract law is about holding persons responsible for what they say they will do in a variety of settings, and such responsibility is a critical component in vindicating basic values such as autonomy, justice and fairness.

Now, as a jurisprudential matter, one can—one *must*, as a good jurisprude—ask whether the courts in contracts or other cases are to make “independent” moral judgments as the community’s delegates, or whether they are to make complex empirical judgments about how the community ranks certain moral claims. *Thor v. Superior Court*,<sup>221</sup> not a contracts case but a dispute about constitutionally protected “fundamental rights,” suggests the latter, though the matter is open to doubt. (Such heavy issues are not confined to constitutional cases: they can come up in litigation of any sort, including contracts.)

Finally, for completeness’ sake, I note that courts, on a daily basis, adjudicate matters concerning “the interests of children” by examining settlement agreements—contracts—dealing with custody and child support. They are open to judicially authorized revision, but they are far from being contractual nullities.

Concerning [2]: assuming *arguendo* that courts have never specifically enforced a surrogacy contract or any of the others mentioned, it does not follow that contract law is “inadequate” in this area. Indeed, Annas should be arguing that contract law does exactly what he wants it to do—refuse to enforce surrogacy contracts. In any case, there is no adequate explanation of “inadequacy”; it is simply a conclusory observation.

Although it is technically true that courts have not enforced surrogacy contracts *as such*, what is left out of this account suggests precisely the opposite of what Annas claims about contract law’s usefulness.<sup>222</sup> In *Johnson v.*

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221. 855 P.2d 375, 383 (Cal. 1993). As mentioned earlier, the court ruled that a prisoner’s choice to refuse lifesaving care was a fundamental common law right and perhaps a state constitutional right. *See id.* at 381. The court investigated contemporary philosophical accounts of autonomy and its moral ranking and incorporated these “findings” into its reasoning. The court said that “[g]iven the . . . legal and philosophical underpinnings of the principle of self-determination, as well as the broad consensus that it fully embraces all aspects of medical decisionmaking by the competent adult, we conclude” that a physician has no duty to treat an objecting patient, assuming the refusal is informed. *Id.* at 383. This might be interpreted as an empirical determination of the community’s values, supplying a key premise in the court’s argument. Such an investigation is critical in (dis)confirming “tradition” under the Fifth or Fourteenth Amendments in order to decide whether a claim involves a fundamental liberty interest. To be sure, it might also be viewed as an application of the court’s own views on the moral status of various ideals, such as autonomy. However, the distinction, in practice, seems very hard to draw.

222. At a later stage of the article, Professor Annas does point out that “[t]hese courts

*Calvert*,<sup>223</sup> the California Supreme Court ruled that custody of a child belonged to the genetic parents in a gestational surrogacy case because they were the intended rearing parents. The court took the view that when genetics and gestation are divided between two women, identifying exactly one “natural mother” requires looking to the parties’ intentions at the time of agreement.<sup>224</sup> The agreement here, even though not enforced as such, was *all but conclusive* on the question of what that intention was.<sup>225</sup> The contractual perspective was thus hardly “inadequate” or peripheral. It was central to the court’s conclusion. Contracts do not have to be enforced *qua* contracts for them to have a powerful effect and to adequately show what needs to be shown under a governing rule of decision.

Now, examine the claim in the same article criticizing the role of courts in assisted reproduction:

[3] The California court’s most important insight was that courts have an extremely difficult time making meaningful public policy in the realm of assisted reproduction because they are limited to deciding individual disputes after the fact, and that the legislature, which ideally can foresee and prevent disputes, is therefore the preferred law-making body in this area.<sup>226</sup>

The term “therefore” ought to be restricted to valid arguments, and none is in evidence here. If courts find it hard to make public policy judgments “because they are limited to deciding individual disputes after the fact,”<sup>227</sup> one would think this difficulty is not confined to assisted reproduction: all adjudication is impeached when public policy seriously intrudes. But the claim is hard to fathom. The theory of common law development and the U.S. Supreme Court’s hostility to “advisory opinions” rest partly on the notion that before *general* rules of decision are announced, the court should be able to see how possible rules and

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arguably did as well as they could, and reliance on prior contracts as a way to resolve controversies in assisted reproduction has also been espoused by leading legal commentators.” Annas, *supra* note 219, at 937 (footnote omitted).

223. 851 P.2d 776, 787 (Cal. 1993).

224. See *id.* at 782.

225. See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 900 (Cal. Ct. App. 1994):

[T]he [California Supreme Court] did not actually hold that the gestational surrogacy contract at issue in *Johnson v. Calvert* was enforceable as such. Rather, the court stated that such a contract is a proper basis on which to ascertain the intent of the parties because it does not offend public policy “on its face.” In *Johnson v. Calvert* the function of the surrogacy contract was to serve as a vessel in which the parties could manifest or express their intention. The gestational surrogacy contract was never held to be enforceable *per se*.

*Id.* (citations omitted).

226. Annas, *supra* note 219, at 936. Annas is referring to *Buzzanca v. Buzzanca*, 72 Cal. Rptr.2d 280 (1998), a surrogacy case.

227. Annas, *supra* note 219, at 936.

their variations play in the concrete matters before them, incrementally adjusting the rules as new facts and perspectives come up in new cases. The entire body of the common law originally developed this way—through deciding disputes “after the fact,” i.e., after a dispute arose that could be presented in specific form to a court. Once again, talking about the supposed infirmities of adjudication seems in reality an expression of hostility to the underlying transactions.

As for the *non sequitur* that legislatures are the “preferred law-making body in this area” because they can “foresee and prevent”<sup>228</sup> disputes: First, absolutely nothing is shown about why “this area”<sup>229</sup> is more fit for legislatures than courts. Second, that the legislature is able to foresee and prevent disputes does not establish that it is the preferred law making body. While knowing in general terms what the future might bring is pretty handy, the lack of concrete knowledge which in some partial form may be before a court cuts the other way. True, a court can be overly swayed by particulars; however, courts, as we know them, decide on the basis of general rules, principles and standards, whether recognized as explicitly or implicitly preexisting, or openly created in a case of “first impression.” In doing so, courts look to the future as well as the past, and in articulating and applying their selected abstractions often assess the expected impacts of their rulings. In many cases, courts can “foresee and prevent” as well or better than legislatures.

Third, we can certainly find tasks and problems fit only, or primarily, for legislatures. Tax codes are not created *in toto* by common law courts, although they may obviously have a spectacular impact on the legislature’s prior work. We can also find matters that are fit only for courts. Adjudications of guilt and imposition of punishments are generally prohibited by constitutional provisions disallowing bills of attainder.<sup>230</sup> But beyond such polar cases, there is no satisfactory theory available that decisively establishes for all kinds of disputes, past, present, or future, whether they can be dealt with more or less effectively by legislatures as opposed to courts. The idea that legislatures are inherently better at deciding how to handle TSARs has no foundation in jurisprudential theory, legal philosophy, historical analysis, or anything else. One might have made much the same claim about whether transplantation of organs from live sources, adult or child, competent or incompetent, should be permitted. What theory shows us that legislatures would have been better than courts in making the initial foundational decisions?<sup>231</sup> Even authorization to rely on “brain death” criteria, though now universally dealt with in the United States through adoption of the Uniform Anatomical Gift Act,<sup>232</sup> can in principle be established through

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228. *Id.*

229. *Id.*

230. Conviction by the Senate following Presidential impeachment by the House is not an exception.

231. See, e.g., *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1969) (authorizing transfer of a kidney from a mentally impaired sibling to his brother).

232. UNIF. ANATOMICAL GIFT ACT, 8 A.U.L.A. 29-62 (1987).

common law adjudication, as in *Lovato v. District Court*.<sup>233</sup>

Perhaps in various cases legislation, while not indispensable, would further goals of predictability and help avoid disputes. But a series of judicial decisions may do the same. Nor is there any basis for the view that critical policy and value-laden analyses, whether styled as moral decision making or reliance on perceived community norms, are better made by legislatures than courts. It is sometimes worth recalling that courts, as ideally viewed, are meant to exclusively inhabit the universe of principled decision making; legislatures are not. While we prefer legislation to be rational and, when not horse-trading or pork-barreling, to rely on principle as do courts, our preferences are regularly frustrated by reality. The claim of legislative superiority is thus not only not made out, but it is in tension with reality.

Elsewhere, Annas points out: “The court’s opinion [in *Buzzanca*], for example, gives no guidance on what should happen if the gestational mother or the egg donor changes her mind and wants to be designated the legal mother with the rights and responsibilities to rear Jaycee.”<sup>234</sup> One could argue that under *Johnson v. Calvert* the matter would be resolved by reference to original intentions. The implication seems to be that if a legislature had considered the problem, it would have anticipated this and, because it is not bound by judicial rules against deciding cases not before it, would thus have saved us a lot of problems. Is it true that legislation generally has fewer gaps and unanticipated problems than a judicial rule of decision? Even if this were to some extent true, would this overshadow the benefits of a court’s focused attention on the singular and vivid facts of the case before it?

Annas also asks: “[4] Must obstetricians and hospitals locate and interpret contracts to determine who a child’s legal mother is at the time of birth? Do commerce, money, and contracts really have more to say about motherhood than pregnancy and childbirth?”<sup>235</sup>

Sometimes, having skills in assembling words in rhetorically effective ways is dysfunctional. (Think of Justice Holmes, the master rhetorician of U.S. law, in *Buck v. Bell*).<sup>236</sup> One is inspired to shout, with Annas that *of course* mere matters of the market, of trade, of (gasp) contracts cannot tell us about (sigh) motherhood, pregnancy, and childbirth!

Sounds good, but question-begging allusions often do—that is why we write and read them so often. What is it that pregnancy and childbirth “say” about motherhood? Cases such as *Johnson v. Calvert* are litigated *precisely because pregnancy and childbirth do not tell us what we need to know*, unless one begs the question by stipulating what is *contested*: that gestation trumps genetics regardless of anyone’s intentions about their respective roles, and therefore

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233. 601 P.2d 1072 (Colo. 1979) (ruling after looking to proposals for legislative action, including failed bills).

234. Annas, *supra* note 219 , at 937.

235. *Id.*

236. 274 U.S. 200 (1927) (upholding the constitutional validity of a statute authorizing involuntary sterilization of a supposedly mentally impaired person).

pregnancy and childbirth “say” “Mother.”

What *can* we say about motherhood and its relation to pregnancy and childbirth? We can say that pregnancy and childbirth just aren’t what they used to be *when we are talking about gestational surrogacy*. The entire problem rests on the division of genetics and gestation. To assume that “contracts” and “commerce” have little or nothing to say about true motherhood simply ignores the central moral/conceptual difficulty concerning how to determine whether our exactly one natural mother is to be the genetic source or the gestational source. Asserting that “but for” the gestational mother the child would not exist is bootless. But for the genetic mother, the child would not exist either.<sup>237</sup>

Now, there are some who simply assert that *obviously* it is the gestational mother because the gestational mother nurtured the child.<sup>238</sup> I do not doubt the formation of emotional bonds by the gestator, but these gestation-beats-genetics commentaries rarely even *refer* to the supposedly peripheral role of the genetic mother. That flaw is fatal to the soundness of the argument, and if such glaring omissions were consistently made across an entire field, then, *pro tanto*, the field would be “broke.” To fix one’s gaze exclusively on the pregnancy and childbirth; to systematically ignore the very genesis of the decision to procreate; to fail to explore common understandings of the idea of “my own child”; to fail to inquire into the state of mind, the expectations, the bond-from afar, of the two persons who exclusively formed the child’s genetic template and who await the child’s birth so that he can be integrated into their family—this is utterly incomplete analysis. Although I disagree strongly with the weight of scholarly authority that automatically favors gestation, the overall field of bioethics, including its legal processes and scholarship, has not systematically ignored the interests of genetic mothers. Particular arguments may be “broke,” but the field is not.

Annas concludes:

[5] If we consider the best interests of children more important than the best interests of commerce, children will be best protected by a universal rule that the woman who gives birth to the child is the child’s legal mother — with, among other things, the right to make treatment decisions on behalf of the child and the responsibility to care for the child. [6] I believe this not because it is the traditional or natural rule but

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237. *But see* George J. Annas, *Assisted Reproduction: Who Is the Mother?* (response to letter), 340 NEW ENG. J. MED. 656 (1999) (responding to letter to the editor).

238. *See, e.g.*, Rothman, *supra* note 37, at 1607.

We need to reject the very concept of surrogacy. We need to reject the notion that any woman is the mother of a child that is not her own, regardless of the source of the egg and[/or of the sperm. Maybe a woman will place that child for adoption, but it is *her* child to place. Her nurturing of that child with the blood and nutrients of her body establishes her parenthood of that child. Trying to find a moral stance that recognizes the viewpoint of women in these various patriarchal traditions is not an easy task.

because the gestational mother is the only one of the three potential mothers [as in *Buzzanca*] who must be present at the child's birth and available to make decisions on behalf of the child. [7] She is also the only one of the three potential mothers who has a personal relationship with the child.<sup>239</sup>

[5]: Annas's statement that the best interests of children are more important than the best interests of commerce registers a false opposition. "The best interests of commerce"? What does this refer to? Commerce is commerce in *something*. Here, it concerns an arrangement designed to create a nuclear familiar through a form of TSAR in which someone is paid for reproductive services. It is unsound to focus on the exchange of wealth while systematically ignoring the creation of a nuclear family. If the point is that some methods of family formation are illegitimately placed "in commerce," that point must be confirmed, and to this point it hasn't. Using "commerce" as a conclusory epithet, but without additional analysis of the supposedly baleful effects of exchanging money or other value, is all but useless. "Commerce vs. best interests" is thus a comparison much too tendentious to be helpful.

Item [6] offers prudential reasons for saying that the birthmother is the legal mother. You *know* who the birthmother is. But if the genetic sources get caught in traffic—or even if they do not—how do you *know* they are really the selfsame genetic sources mentioned in surrogacy contract? You cannot *see* genetic motherhood the way you can *see* childbirth.

There is some risk here, not overwhelming, but nonzero. Now, are we going to overturn a novel way of forming a nuclear family, to which all the parties agreed, because of the small chance that the gestational mother, or a stranger, will claim that she is in fact the genetic mother, leaving us all hopelessly confused without the vaunted bright-line rule that gestation proves all? And, if this unlikely scenario *does* come up (as unlikely scenarios have a way of doing), there are relatively quick and accurate scientific methods to determine who's whom. This is annoying and costs money, but it will not happen in a large fraction of cases and the asserted risks simply do not outweigh the benefits, *except for those who place small value on the interests of genetic parents who want a family*. Here again, we see that the central moral question has been begged: What is the relative valuation of *supplying ova in order to become a genetic mother and being the gestator of a child*? A low value assigned to the former leads almost automatically to assigning custody to the gestator, and explains why custody is decided on the basis of an unlikely and minor delay in identification. If the value of reproductive planning by a genetic mother and father is near zero, then even a minor risk of confusion vastly outweighs it.

So, the proposed pragmatic rule favoring gestation not only avoids the hard moral choice—it *presupposes* that it has been settled, and thus adds little or nothing to rational debate on the issue.

[7] Next, we have Annas's argument that the gestational mother is the only

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239. Annas, *supra* note 219, at 937 (footnote omitted).

one with a “personal relationship” to the child. Is it hard to see the circularity here? What does “personal relationship” mean? It must mean, in this context, that the pre-child developed inside the gestator’s body. So, “I have a personal relationship with this child” means “this child’s body was locked into and growing in mine.” Genetic connection, however, is evidently no basis for a personal relationship. After all, what about anonymous sperm donors or even egg donors? No personal relationships there, right? Why aren’t all problems this easy?

But we are not dealing with anonymous suppliers of gametes. We are dealing with someone who supplied half the child’s genes *on the understanding that this procreational contribution would be realized through the custody and companionship of the child.* Genetic determinism may be false, but if “Genes-‘R’n’t-Us”—if they aren’t everything—they sure as hell aren’t nothing. Environmental determinism is at least as false as genetic determinism. Why this intended connection via genetics and companionship is not a personal relationship—different, to be sure, from the gestational connection—is not apparent. It is obvious that, once again, a rhetorical display rests on begging the central question: Is the gestational relationship the true personal relationship, and the genetic relationship the imposter—or the reverse? Note that nothing whatever is said about one of the prime elements of the personal relationships in question here: the nature of the psychological bonds of the genetic and gestational mothers with the child in any given case, and in general.

Perhaps the baleful influence of Oliver Wendell Holmes, Jr. really is at work here. He has caused generations of imitators to struggle for their Black Belts in Rhetoric. They have all failed. What’s more, Holmes himself failed. (No time to show this and the margins are too small, but I have a great proof.) Give it up.

Finally Annas states: “[8] [A] bad way to protect the children who have been conceived and born with the assistance of the new reproductive techniques is simply to provide the adults involved with what they want.”<sup>240</sup>

Is it a bad way to protect children born the more-or-less regular way to let their parents keep them *just because that is what the parents want?* Why, the very idea is ridiculous. It’s time to institute Plato’s Republic and stop all this procreational autonomy foolishness and install the true protector of all, the Republic. Let the parents get together, let the child be born, and then the Philosopher Kings will take over and the child will be raised *properly.*<sup>241</sup> The idea that children’s interests might be promoted *precisely by providing the adults*

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240. *Id.* at 938.

241. See PLATO, THE REPUBLIC AND OTHER WORKS, Book V, 151 (B. Jowett trans., Dolphin Books 1960) (“The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.”). Cf. *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 286 (Cal. Ct. App. 1993) (quoting *Adoption of Kelsey S.*, 823 P.2d 1216, 1234 (Cal. 1992) (“We simply do not in our society take children away from their mothers--married or otherwise--because a ‘better’ adoptive parent can be found”)).

*who planned their existence with what they want* is ridiculous, right?

Now, substitute TSAR for regular procreation. What are the exact reasons for rejecting out of hand what the parents want? There are no exact reasons. There are speculations about objectification, dehumanization, exploitation, and a large number of other slogans indigenous to the TSAR literature. But what is truly demoralizing about this last quoted statement, which is shared by many in the business of commenting on TSARs, is the offensive dismissal of individual and parental reproductive autonomy. Who cares about it anyway? They *want* a child? Who do they think they are to claim that “simply” wanting a child carries any weight in this Republic?

None of these complaints suggest that the pursuit of bioethics is gravely impaired. They do indicate that certain aspects of its practice can stand some serious repairs. Careful analysis will, I think, suggest that many of the asserted risks of life science technologies are greatly exaggerated.

*2. Refocusing on Interpersonal Bonds in an Age of “Investing” in Genetic and Nongenetic Human Engineering Plans: The Risks of Reduction.*—All biological technologies used on ourselves and our possible and actual children ought to be assessed for their risk of eroding noncontingent bonds. “Bonds” here refers to the sense of duty and feelings of affection we have for our children, whatever their traits, and for each other as persons.<sup>242</sup> It is not silly to wonder whether, say, altering physical and mental traits in living persons, or altering the germ line to produce or augment specific attributes, may lead to viewing individual worth as contingent on whether the engineering plan “succeeded.” Different technological and social arrangements for reproductive engineering pose different levels of such risks: It is one thing to pursue IVF or surrogacy when used simply to relieve infertility within a standard family (there, the investment is in money, time, some physical discomfort, and emotional distress). It is another to plan human trait alteration. I do not propose flat bans on the latter; I simply say they pose greater risks because *planning* a trait makes that trait more salient, and possibly more valuable or fearful in our eyes. Ideally, we are more oriented toward viewing most traits as simply one of many. We thus can avoid one form of “reduction” in which whatever value one has as a person is ascribed to the single trait or traits in question. But ideals are one thing, reality another. Reduction is the core mechanism of “objectification,” and, if we are concerned about (de)valuing people in this reductionist way it requires close attention.

Although focusing on the precise mechanisms of reduction may be helpful, this too has its limitations. Yet another paradox is at work in reduction analysis: We are at risk for reducing people to specific traits because these traits are useful to us or, in any case, were planned or “ordered up.” This is not good. But what is the alternative? How do we value people in the preferred way? After all, we do not bond to disembodied entities.<sup>243</sup> We choose friends and colleagues on the

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242. See Shapiro, *supra* note 137, at 683-87.

243. See Hans Jonas, *Against The Stream: Comments on the Definition and Redefinition of Death*, in *PHILOSOPHICAL ESSAYS: FROM ANCIENT CREED TO TECHNOLOGICAL MAN* 132, 139

basis of a variety of traits, although usually in a nonspecific way. How would we ordinarily respond to the question: "Why do you like X"? Specificity here might suggest a diminished view of the person. How would we respond when the person's attributes derive from germ-line control?

It appears, then, that the very process to be feared—reduction of persons to things—rests on attending to traits, but that attending to traits is central to desirable valuation of persons. The (partial) resolution of this tension would be to mark out the differences in how we address traits when we improperly reduce persons as opposed to properly valuing them.<sup>244</sup>

### III. THE IDEA OF PROGRESS IN ETHICS AND LAW, AND SCIENCE AND TECHNOLOGY: IF BIOETHICS WERE BROKE, HOW WOULD WE FIX IT?

#### A. Preface: *The Domains and Senses of Progress*

1. *Advancement, Stasis, Regress, and Falls.*—There is a sizeable literature on the idea of progress and how that idea has progressed, or has at least changed. But much of it is of limited use for my purposes—comparing the ideas of progress in moral and legal theory and their applications to human behavior, science, and the life sciences and technologies in particular.

Historians of both the concept and the fact of progress often note its contrast with earlier, quite different visions of human life: stasis or even regress in human affairs, perhaps in a fall from some golden age.<sup>245</sup> Whether we have "fallen" or "regressed" or stood pat, however, is as much a matter of evaluation as it is of fact. "Progress," like many of our major concepts, is normatively ambiguous, and thus so is "catching up." Whether X ought to catch up with Y depends on valuations of X and Y and the moral and nonmoral costs of catching up. Whether X has indeed caught up, gained on, or even exceeded Y, is also a matter of value and fact.

Some of the critiques of contemporary technology seem to reflect the view that we have indeed fallen from better times, that we are now static or backsliding, and that the misnamed "progress" of technology is a major malefactor. We will not progress or rise from our fall unless we abandon at least some of our major technological aberrations. The prospects, on this view, are pretty gloomy. Who would be willing to give up polio vaccines and the complete compact disk collection of Beethoven's works?

2. *Categorizing Progress.*—We can map categories of progress onto

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(1974).

244. The issues of reduction and valuation are discussed more extensively in Shapiro, *supra* note 66.

245. See DANIEL SAREWITZ, FRONTIERS OF ILLUSION: SCIENCE, TECHNOLOGY, AND THE POLITICS OF PROGRESS (1996); Daniel Callahan, *Challenging the Mythology of Progress*, 12 MED. HUMANITIES REV. 92 (1998) (reviewing SAREWITZ, *supra*). See generally ROBERT NISBET, HISTORY OF THE IDEA OF PROGRESS (1980); Frankel, *supra* note 21, at 483; Morris Ginsberg, *Progress in the Modern Era*, 3 DICTIONARY OF THE HISTORY OF IDEAS 633 (1973).

whatever classification scheme we use to describe ourselves and our doings. We can refer to our habits of thought and feeling; our behaviors; our social, political, economic, and cultural circumstances; the physical environment generally; the assorted branches of science and technology; and so on. As soon as one starts this taxonomic exercise, it is obvious that particular notions of progress, though linked, may be sharply different. "Intellectual progress" and "applied technological progress" are not the same. One also notices that how fields of endeavor are sorted may hugely influence the proper ascription of progress, regress, or stasis. Focusing on precisely defined enterprises can yield easy attributions of progress or failure, narrowly understood. The Human Genome Project, for example, will be completed within a few years. We will have progressed in accumulating knowledge—the location and sequencing of all our genes. How quickly we will move in using this knowledge for improving medical therapeutics is unclear, and whether such advances will always constitute "progress" in a moral sense is also uncertain. The same reservations apply, with even greater force, to enhancing human traits.

One can also distinguish progress as applied to different fields of thought and behavior and to different kinds of progress within that field. Progress in physics is different from progress in philosophy, and there are different sorts of progress within each field. Subsuming Newton's gravitational theory within Einstein's was progress, but of a different form than confirming the existence of elementary particles. Many of Rawls' contributions marked progress in philosophy, but so did the long-standing recognition that basic concepts such as justice and autonomy come in sharply conflicting versions. The latter is a piece of conceptual analysis that may or may not help decisionmakers in reaching a conclusion, whatever illumination it bestows. The former is meant to guide decisionmakers to at least certain general conclusions about the structure and institutions of a liberal political system.

Here the primary comparisons among different kinds of progress are, as I have said, between science and technology of any sort, on the one hand, and moral and legal theory and application, on the other. A related inquiry would inspect progress in human behavior, but here the difficulties are not in recounting facts (people do keep killing and rescuing each other), but in morally characterizing what they do. Some might recommend yet another inquiry: whether we have uncovered a better way to accomplish a given goal. "Progress is . . . defined as 'the end point, temporary or permanent, of any social action that leads from a less to a more satisfactory solution of the problems of man in society.'"<sup>246</sup> This does not seem to be a separate project, however; at some point,

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246. LESLIE SKLAIR, THE SOCIOLOGY OF PROGRESS at xiv (1970).

If we wish to control the sex of our children, then the biological solution is undeniably more satisfactory than infanticide, whether it is considered innovative or non-innovational progress. In terms of the sociological ethic, if we want to control sex then given that the choice is between some form of infanticide or some efficient biological solution the latter clearly satisfies human needs, individual and social, better than the former.

the goal itself has to be tested under a more general concept of progress.

A major source of both insight and confusion in thinking about progress is the enlightenment-era view held by many that “the methods and spirit of science should be applied to all fields. In consequence, the idea of progress came to include a concept of social and moral progress.”<sup>247</sup> After all, sound moral analysis reflects rational thought just as science does. If so, one would expect important links between moral analysis and scientific reasoning—and the parallels are indeed striking. But so are the differences.<sup>248</sup> One can press the analogy too far, blinded by the vision of science and mathematics as the paradigms of rational thought.

Although many of the issues remain disputed, our topic requires attention to these domain differences. Empirical observation and testing undergird both science and moral analysis, but in quite different, if overlapping, ways. One way of seeing this is to think of the existing range of indeterminacy—of fact and theory in science, and of theory and application in moral analysis. The extent of scientific indeterminacy is regularly and clearly diminished by both grand discoveries and small findings.

Although we may sense improvement of sorts in moral or legal thought and understanding, and a corresponding marginal reduction of indeterminacy, these are sharply different from advancement in science. Whether moral and legal indeterminacy have been reduced is itself notoriously indeterminate. Moral and

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*Id.* at 222

See *id.* at xiv, for a definition of the innovative/non-innovative distinction. The former refers to “the production of new things, ideas and processes, with maximum *impact* on society.” The latter is “progress by means of the maintenance and diffusion of familiar things, ideas and processes, with minimal *impact* on society. The term *impact* is used in a special sense to signify the effect that the different types of progress have on social structures.” *Id.*

247. Frankel, *supra* note 21, at 484. See generally SKLAIR, *supra* note 246.

248. See Nagel, *supra* note 11, at 202-03 (comparing and contrasting the aims of moral and factual knowledge, stating that “both require transcendence of a purely personal point of view to one that is more shareable and objective. But the convergence sought by moral thought is practical and motivational, whereas the convergence sought by factual and scientific thought is convergence of belief—convergence on a true account of how things are, or a common picture of the world. The pursuit of moral knowledge, therefore, must proceed by the development of our motives and practices, not of our beliefs and descriptions.”); Ternasky, *supra* note 208, at 127 (“Note that movement toward the truth [in science] is measured not by reference to the theory but by the strength of the corresponding evidence.”). This contrast may be too sharply drawn: what counts as evidence may be theory-dependent. See also P. Lance Ternasky, *Moral Realism Revisited: On Achievable Morality*, 42 EDUC. THEORY 201, 204-06 (1992) (discussing “the relation between science and ethics” and “objectivity in ethics”); Jeffrie G. Murphy, *The Possibility of Moral Philosophy* (unpublished manuscript described in MICHAEL H. SHAPIRO & ROY G. SPECE, JR., BIOETHICS AND LAW: CASES, MATERIALS AND PROBLEMS 78-79 (1981)). See generally RICHARD B. BRANDT, *ETHICAL THEORY: THE PROBLEMS OF NORMATIVE CRITICAL ETHICS* 242-44 (Arthur E. Murphy ed. 1959). For additional discussion and citations, see Leslie Sklair, *Moral Progress Revisited*, 31 PHIL. & PHENOM. RES. 433 (1971).

legal progress may rest on appreciation of new facts or a heightened appreciation of old facts (assuming this is a meaningful distinction), but they do not *consist* of finding or appreciating these facts. Sometimes simply being confronted with a new problem, recognized as such, is a form of progress.

In many ways, then, the indeterminacies of fact and theory in science do not cohere with those in law and morals. The indeterminacy of major concepts of moral and legal analysis—justice, fairness, due process, equality, liberty—is built into their structure and in principle can never be fully “resolved.” Indeed, it is difficult even to posit what could be meant by saying: “Now we’ve got it—the answer to how to reconcile equality and fairness, liberty and justice, etc., in general, and for all time.” The areas of indeterminacy in science carry the potential for becoming progressively and substantially smaller concerning particular issues. (In some sense, of course, science opens up new areas of indeterminacy by its very discoveries and confirmations.) True, we may remain forever confused by “beginnings” (did a “singularity” “cause” the “infinitesimal” point to go bang?) and “endings” (what could it mean to say the universe has ended?). In part, these are scientific/conceptual problems, not just matters of not knowing “the facts.” But these “edge” problems and other embedded limitations in scientific theory are different from our across-the-board, in-your-face, daily confrontations with the intractable concepts of legal and moral theory. In any case, one cannot simply “extend[] the standards and methods of the sciences to all domains,” as some enlightenment thinkers evidently believed.<sup>249</sup>

One can also “think small” in trying to sort different forms of progress. Thus, we can talk about progress in solving or gaining on discrete tasks. This leaves us vulnerable to the charge that we cannot really know if we have made progress without looking at the Big Picture. But we can answer, as we often do, that we do what we can at the moment. In science and mathematics, one can speak of *settling* a specifically characterized problem, though sometimes conceding some wiggle room or margin of error. How fast does light go? We seem to have a pretty good grip on this, but perhaps not to the *n*th decimal point. We have less of a grip on the Hubble Constant and because of observational limitations, there may be a limit to how accurate we can be. On the other hand, the expression  $(x^n + y^n = z^n)$  *really* has no positive integer solutions where  $n > 2$  (or so we are told).

But “solution” is here a weasel word, particularly when one is thinking small. There was a “solution” in *Johnson v. Calvert*<sup>250</sup>: custody was awarded to the genetic parents because that was the original deal (yes, “deal”) and the particular case was over. But whether it was a solution in any other sense is less clear. Many commentators think the outcome was wrong. In particular, many think that the criterion of “contractors’ intent” is morally flawed—even if we call it “procreators’ intent.” The larger problem, existing beyond the law of that case,

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249. Frankel, *supra* note 21, at 484. See also Holmes, *supra* note 15, at 157 (stating that “just as science cannot by itself yield answers to moral problems, ethical analysis that looks to science for its model cannot do so either.”).

250. 851 P.2d 776 (Cal. 1993).

remains undiminished. One can draw parallels to science here, where all results, from the inflationary universe to the microbial origins of strep throat, remain theoretically open. In moral analysis, however, there is no clear *program* for determining when previously accepted views have been disconfirmed. Even the vaguer sciences—think of paleontology and the supposed saurian origins of birds—can provide descriptions of what would count as (dis)confirmation, even if closure is unlikely because of the incompleteness of the natural record.

What is the point for us? Was *Johnson v. Calvert* “progress” because it legally resolved a dispute? Progress for whom or what? Was it legal, moral, or intellectual progress? Was pinning the result on “procreational intent” progress, regress, or neither? Perhaps it was progress in the simple sense that it provided a vivid illustration of one way of working through the problem by identifying material issues and then resolving them. Bioethics, in this sense, has been developing a large treasury of insights, rules and precedents. It is not that results do not matter—far from it. It is that the complex mixture of commentaries and legal outcomes do not represent some gross deficiency in any of the branches of bioethics. The field has been (imperfectly) progressing from its start, and continues to do so.

It seems necessary, however, to distinguish progress along different fronts: “overall” progress does not usually happen all at once. Moreover, truly massive, transformative shifts do not often occur in law or ethics<sup>251</sup> and are not everyday or even every-century events in science. Thinking small is probably the only sensible way to *start* talking about progress in human behavior—although one certainly cannot end there, for smaller events may cascade into larger events bearing unintended consequences. The more effective are our public health and health care systems, the greater the population pressure (other things remaining equal, which they might not). The greater the range of choice over some matters, the more burdened some decisionmakers become. True, some modern standards of impermissible violence seem to be clear improvements—e.g., the general ban

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251. Note Rawls’s comment stating:

[T]he extraordinary deepening of our understanding of the meaning and justification of statements in logic and mathematics made possible by developments since Frege and Cantor. A knowledge of the fundamental structures of logic and set theory and their relation to mathematics has transformed the philosophy of these subjects in a way that conceptual analysis and linguistic investigations never could . . . . The problem of meaning and truth in logic and mathematics is profoundly altered by the discovery of logical systems illustrating these concepts. Once the substantive content of moral conceptions is better understood, a similar transformation may occur. It is possible that convincing answers to questions of the meaning and justification of moral judgments can be found in no other way.

RAWLS, *supra* note 195, at 51-52. Aside from the phrase “a similar transformation may occur” (how similar?), which seems somewhat overdone, this seems a plausible account of what “progress” might be in moral analysis. But it remains quite distant from advances in logic, which belong to mathematics as much as to philosophy. The comparison can easily be pushed too far if care is not taken to distinguish between what would count as “convincing answers” in widely different fields.

on dueling and various blood sports. To which one can respond with a few simple words, such as "The Balkans" and "East Africa."

Clearly, then, characterizing progress has concurrent aspects involving description, value judgments about changes already in place, and, most importantly, an ideal of striving toward whatever is deemed advancement in a field. Progress often embodies a perfectionist ethic that applies itself to individuals, groups, tasks, disciplines, and to human thought and conduct generally.

### *B. The Search for Final Answers and the Impossibility of Progress (in That Sense)*

*1. Setting Up a Search.*—Investigating moral, legal, and scientific progress sucks people into infinite loops. As we saw, one must ask, "Progress in what?", and the opportunities for tendentious characterization are endless. Are we addressing perfectibility of human conduct or of our normative and philosophical systems of thought? How are the ideas of progress in science or technology different from those of progress in philosophy, behavior, or anything else?

There is no way to think about progress in ethical theory, analysis, or behavior unless one knows how to evaluate ethical theory or human behavior and thus how to know what counts as improvement. It takes ethical theory to tell us if progress in ethical theory has occurred. Although this is not entirely circular, we may not get very far when we deal with seriously contested moral issues: the very criteria for rightness or goodness, and therefore for moral progress are in dispute. So, it is hard to be even adequately superficial here (not an oxymoron).

The idea of progress in ethical theory or analysis is not empty, however, and there is some thin meaning and then truth to the claim that these disciplines have to "catch up" to the speedier progression of science and technology. The non-method method I use in examining the claim is to start with a set of problems—a kind of ostensive explication of the question and of possible answers.

*2. A Search.*—Consider again *Johnson v. Calvert*,<sup>252</sup> which, as I suggested, is a classic illustration of how technological rearrangements of important life processes generate anomalies that seem to exceed the capacities of our existing frameworks of thought, whether descriptive or normative.

We saw that although the California Supreme Court reached a decision and disposed of the case, full normative "closure" has not occurred and is not likely to. Those dissatisfied with the outcome of the case and/or its reasoning might say that this is the perfect example of law and ethics having to catch up with technology. We need *progress* in our ways of dealing with these "category bastards"—these "unclassifieds"—born of our reconstruction of life.

Let us take the demand for a satisfying answer seriously. The question is: Who is the natural mother and thus entitled to custody? (First problem: is this the right question to start with? What other starting questions are there? Should we have asked: Which groups and interests back which side? But let's push on.)

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252. 851 P.2d 776 (Cal. 1993).

Why does there have to be exactly one natural mother anyway? We can be exhaustive in specifying plausible answers. Here are *all* the outcomes that *reasonably* could vie for being the single, true, right answer. (Perhaps carelessly, I do not list additional candidates for natural motherhood —e.g., the natural father, the Queen Mother, Betelgeuse, etc.) 1) The natural mother is the gestational mother; 2) The natural mother is the genetic mother; 3) The genetic and gestational mothers are both natural mothers, and custody must presumptively be shared equally; 4) Neither one is a natural mother—that's just the way some things turn out when the world changes; and 5) The natural mother is the female who was intended by the parties, at the time the reproductive arrangement was made, to have full, permanent custody, along with her spouse or partner, if any.

What follows from these sharply different premises? The fourth alternative—there is no natural mother—is the most problematic. Although it is an obvious possibility, it seems far less plausible here than in the biologically quite different situation in cloning, where reproduction is of course asexual. But if there were no natural mother and no natural father available, what then? Perhaps the state would take initial custody and try to arrange for the child's adoption or her placement in a Kibbutz, or to award custody to either the genetic or gestational mothers based on which one wins a coin toss or survives mortal combat against the other.

The *Johnson* court, as we saw, chose the fifth possibility—the initial joint decision of the parties that the child would be with the genetic parents. Of course, we cannot *prove* which is the right answer, in the way that Wiles *proved* Fermat's last theorem. Nor can we prove which is the right answer in the sense that we can prove smoking causes cancer. We cannot even prove it, within the boundaries of a specified set of norms, in the sense that we can prove that it is presumptively wrong to kill a non-threatening innocent person knowing that she is innocent. But there's no "proof" of this in the sense that a theorem or a scientific claim is proved. (And it is just a presumption, in any case.) The absence of a calculable, or otherwise ascertainable answer satisfactory to all rational persons *is built into the conceptual structure of the problem*. Ethical theory and much of legal analysis are disciplines that developed (in part) *to deal with certain matters of choice that cannot be answered determinately*—at least not in every case. While one can certainly draw strong parallels between scientific thought and ethical analysis, doing so hardly shows their identity. It shows, if anything, simply that they are both rational enterprises sharing certain features of logical consistency and coherence, though they involve different domains of thought.

So, what is ultimately in dispute in proving what the right answer is in *Johnson v. Calvert* concerns the very criteria for what counts as a "proof." If we cannot settle this, is "progress" meaningless here? "Progress" itself cannot be defined by necessary and sufficient conditions, and in many cases cannot even be linked to a precise set of "factors" or "variables" that effectively narrow the set of possible answers.

For example, think of the ethical/political/legal idea of equality. We of course want to treat the genetic and gestational mothers equally by giving each

an equal opportunity to argue her position; to satisfy standards of equality in finding organ sources and selecting recipients; and to deal with people equally as genetic and nongenetic forms of human enhancement arrive on the scene. How do we do this? Whether we think of "equality" in purely philosophical terms or as a constitutional concept to be interpreted, we cannot, in all cases, clearly determine what even *counts* as (in)equality. If the ratio of personal income to the energy expended in earning that income is equal for all persons, is this equality? What if the equal energy expenditure is by a brain surgeon on the one hand and a squeegee worker on the other? If everyone has equal opportunities (whatever *that* means) but everyone comes up with unequally valued holdings, is that inequality or equality?<sup>253</sup> Must we provide enhancement opportunities to the least gifted and impoverished in order to avoid making existing inequalities worse? To whom should forbiddingly expensive opportunities for extending life to age 120 be distributed?

To call for crisp demonstrations of what the right answers are when doing ethical or legal analysis is, then, to badly misconstrue the nature of conceptual, moral, and legal reality. As long as persons are different, we will have equality problems, and many of them will *never* be "definitively" solved, although some may become less important or even irrelevant over time.<sup>254</sup> If progress entails the perfected ability to find such answers, then only minimal progress, if any, is possible in ethical theory—indeed, in all philosophical analysis—and in law. There is no such thing as "catching up" in this sense. I think *Johnson v. Calvert* was rightly decided and can offer colorable arguments in its defense, but I cannot prove that it is right (in the sense that Wiles proved that Fermat was right), just as you cannot prove that it is wrong. If there is any "progress" here, it is in emphasizing the *rational possibility* of looking to original intentions as a means of resolving disputes. Even critics of the case should reasonably concede that the quality of deliberation about its outcome was superior to the deliberation that would have taken place without the introduction of the parenthood-by-original-intentions idea. That perspective *required* analysis. This notion of progress in deliberation may seem to be a pretty slender advance, but it is the only one available, a point I will return to later.

### C. Progress in What?: Behavior, Theory, Insight, and Deliberation

Perhaps the call should not be for progress in moral and legal theory. It should be for improvement in moral behavior in dealing with the stream of innovations we continue to generate. If so, we need to separate progress in moral and law-abiding behavior—human perfectibility—from progress in moral and legal theory, and to distinguish all of these from progress in science and

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253. For an extended analysis of the competing versions of (in)equality, see DOUGLAS RAE, *EQUALITIES* (1981).

254. For example, it is at least conceivable that technology for creating specialized tissue or even organs might be developed from a person's genome, and, over time, become relatively inexpensive to obtain and transplant.

technology. I leave aside all attempts to explain notions of social, political, and economic progress.

1. *Progress in Moral Behavior and Law-abidingness.*<sup>255</sup>—First, I do not mean to conflate the ideas of moral behavior and law-abidingness—they are very different, though linked—but comparing them would be an unnecessary distraction.

Second, it is hard to see how to “measure” such progress given the empirical and conceptual difficulties already recounted. The conceptual problems are obvious: to the extent that we do not know what moral behavior is, we cannot measure changes in its incidence. For example, the number of abortions and the abortion rate have increased greatly during the course of the Twentieth Century. Is this evidence of moral progress because it reflects the ever-improving status of women and their approach to equality with men? Or is this moral regress because it kills budding human entities (persons or not) and reflects moral recklessness in risking the creation of human entities bound for destruction before birth. Considering all the available techniques for contraception, how can people be so stupid as to keep on causing undesired pregnancies? This is not progress in human behavior. We are as incompetent as we were tens of thousands of years ago; we simply have more technological options through which to display our incompetence. That isn’t progress either.

On the other hand—don’t we have fewer wars, massacres and genocides? All right, try something else. We have better public health measures—at least in “developed” countries. (No Calcuttas in the United States.) This reflects a more refined concern for the value of human life, and this is paradigmatic of improved moral attitudes and behaviors. On the other hand, human survival is good for business, other things being equal, so it is in our self-interest to keep more people alive. Public health measures simply reflect rational collective action to promote one’s own welfare and do not really demonstrate any “refinement” in moral sensibilities and actions; they reflect just a simple understanding of the individual gains from collective action. After all, that is what the evolution of cooperation is all about. Whether this account is sound or not, it illustrates the difficulty of identifying moral progress in our behavior.

At least there are improvements in civility, tolerance, and the acceptance of human differences—except, perhaps, on the roads and highways, and certainly in the Balkans, Northern Ireland, the Middle East, Afghanistan, the Indian Subcontinent, much of Africa, the Russian Republics, and the corner of Fifth and Main Streets in downtown Los Angeles. Think of the improvement in professional instruction in law schools. No more paper chase, no more “How did you get into this law school?” Even better, few places on the planet currently

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255. See generally Ternasky, *supra* note 208, at 129 (stating that “it is difficult to refute the claim that the movement [in moral history] has been in the direction of greater moral sophistication and clarity,” and suggesting that this claim rests on “the dramatic evidence of change,” referring to “the emergence of rights, egalitarian sentiments, widespread call for social and distributive justice” as examples, and concluding that all this “rivals the growth of science during the same period.”). The author goes on to cite the growth of anti-slavery sentiment. See *id.* at 130-31.

permit or encourage dueling. If only we had advanced this far much earlier, Alexander Hamilton might still be with us. The ban on dueling has no doubt saved countless persons, instead allowing them to participate or die in ethnic cleansing operations and gang fights. Perhaps serial killers are more polite these days, too.

What would constitute improved moral behavior in the face of new technological powers? Think of human cloning. How does behavior or moral analysis “catch up” here? By swiftly, permanently, and flatly banning human cloning or attempts to accomplish it (taking care, of course, not to snuff important research that could prolong or improve lives). If you don’t see this as catching up, consider lesser forms of regulation through legislation and/or judicial application of existing laws combined with common law development. But what is to be the substantive and procedural content of such regulation? How is lineage to be determined? Is the state to monitor the custodial parent(s)’ quality of parenting? None of this is catching up? There seem to be few options left: Doing absolutely nothing about it and letting private ordering determine the rate and circumstances of human cloning; destroying all biological laboratories; sending someone back in time to prevent the development of human cloning and then bringing her back to the future in order to minimize temporal paradoxes; and—what else?

We thus need to return to the analysis of progress in moral theory. Without doing so, we cannot make progress in discussing progress in moral behavior.

2. *Progress in the Quality of Moral and Legal Theory and Deliberation; Normative Insights and New Conceptual Tools as Progress; Micro and Macro Progress; The Limits of Progress in the Face of Indeterminacy.*<sup>256</sup>—

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256. I will not probe the meaning of “indeterminacy” as applied to legal, moral, and philosophical claims generally, except to say that it suggests that there is in principle no unique reasoned answer to certain questions about the nature and confirmability of these claims.

There is some parallel between the discussion in this section and that in Seedhouse. See generally Seedhouse, *supra* note 206. The author sets up several examples of difficult problems in health care rationing, and concludes that bioethical reasoning cannot provide predictable answers. *See id.* at 288-90. I assume this is a form of indeterminacy. However, he does not discuss whether the conceptual and normative clarifications represent any form of advancement, nor whether it increases the probability of some consensus decision, whether ultimately defensible on moral grounds or not. However, Seedhouse seems to be saying that bioethicists *as they are* (or were when he wrote in 1995) seem pretty useless, but that they can be doing other things. He says, in reviewing his rationing scenarios, for example, that it is likely that bioethicists “will miss the point: it will be detached from the reality of the family situation.” *Id.* at 289. I do not know what this reality is taken to be, nor how coming to grips with it will reveal the (or a) moral solution. I suppose that coming to grips with reality is a form of rationality, but he complains of bioethicists who “suggest ways of health care rationing solely through rational means.” *Id.* He later says that “because the world is the way it is [The conceptual world? The world of everyday life and its existing health care systems?], by using standard bioethics methods one will never get to the bottom of the matter, and it will be impossible to decide rationally between rival sets of criteria and principles.” *Id.* at 290. “Standard bioethics methods” refers to isolating the problem; getting basic

a. *Does moral progress rest on discerning objective truths about moral reality?*—The major risk of discussing this is that one will plunge, probably sooner than later, into an extended discussion of “moral reality/truth,” which seems to be roughly coextensive with the entire field of ethical theory and moral epistemology. The challenge offered against the idea of moral progress is that if there is no objective moral reality, what could “moral progress” possibly mean? If there is no moral reality, then there is no moral progress. There is nothing we can specify that we are getting closer to or “progressing toward.” Even achieving greater consensus—a sort of practical progress—does not unequivocally reflect moral progress. If a consensus avoids clear harms or promotes clear benefits, it might constitute moral progress independently of the content of the consensus—or it might not. It cannot automatically count as moral progress unless the consensus is founded on an intersubjectively confirmable moral truth.

The alternative to some strict form of “provable” moral reality is not moral relativism, but it is difficult to state just what that alternative is. Perhaps we think moral propositions are capable of being true or false, but that the determination of these truth-values is so different from that of truth-value in science that phrases such as “moral reality” or “truth” are misleading. Saying

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information and “key theoretical considerations” down, including consideration of available resources, of needs, and of outcomes; applying criteria of fairness to the situation in question and to alternative situations; and suggesting an “ethical arrangement” to the family beset with the health care distributional problem. *Id.* at 288-89. It may be that he thinks the central difficulty is applying principles of rational thought to “non-rational” (random) or irrational systems. *See id.* at 290.

At this point, one would think the only option is to punt. But Seedhouse has recommendations that bioethicists, in his words, need to “work through.” *Id.* One would think that this was perfectly “rational”; perhaps Seedhouse believes “rational” applies only to relatively hamfisted or formalistic applications of various substantive principles, such as autonomy or utility. He complains of several failings of bioethics: Bioethics does not call into question the “dominance” of medicine and “does not challenge the deliberations and strategies of politicians, which partly contribute to the climate of rationing” (this is doubtful); bioethics fails to compare “medical systems” with “other systems in society” (also doubtful); it views inequality in health as mainly about access to means of cure or amelioration of disease (this seems quite appropriate considering the subject matter, as long as one keeps matters of prevention and humane behavior in mind); it does not question the role of technology as the “major weapon against disease”; and it “does not engage in sustained philosophical analysis of the meaning of key words such as health, welling, medicine and disease—that is, bioethics does not properly examine central matters of health care purpose.” *Id.* at 290. I do not agree with these claims. After then calling bioethicists to task for “accept[ing] uncritically the context which generates the problems it tries to deal with” (I doubt this also), he identifies two paths—standing “outside” the system, and viewing health care systems “for what they really are”—tribal systems. *Id.* at 291. He prefers the first path; it is a precondition to “talk[ing] constructively about health care rationing.” *Id.* As I suggested earlier, it is not clear what it is to be inside or outside bioethics.

What is missing is an account or example of “talk[ing] constructively about health care rationing.” *Id.* I have no clear idea of what the preferred program is.

this does not presuppose an objectively confirmable moral reality. I do not think that “progress” is rightly tied to such a rigorous, but unrealistic, showing about moral reality. Beyond this, I am not about to solve the central problems of moral philosophy, and say nothing about moral reality.<sup>257</sup>

b. *Examples.*—Again, I turn to examples to work out ideas of progress.

In *Brown v. Board of Education*,<sup>258</sup> the Supreme Court ruled that *de jure* separation of students by race in public schools violated the equal protection clause of the Fourteenth Amendment.<sup>259</sup> Did this decision, and its long-term educative effects, represent progress in moral and legal analysis, and in human behavior thereafter?

Leave theories of constitutional interpretation aside for now, and deal with pure normative/conceptual analysis of the idea of equality. (The two are not utterly divorced. “Pure moral analysis” is for some a proper path of constitutional interpretation in which one searches for the best theory of the moral concepts in question.) Compare the prior dominant view—that equality is satisfied when the groups that are separated are nevertheless treated equally in a limited material sense—“separate but equal.” One can easily formulate an egalitarian description of this at a high level of abstraction: “Everyone is being treated the same. Whatever your race, you have substantially identical educational (or other) facilities.”

How did we come to think otherwise—to move from these thin abstractions tendered in defense of segregation to begin taking account of different conceptions of equality and perhaps of certain real-world effects? Did we discover previously unknown empirical truths? Perhaps we learned for the first time that formal legal separation injures the members of the nondominant group in some ways (insult, offense, diminished self-view, depression, stigmatization, and so on), even without regard to “equality” of material facilities. Or did we already “know” this in some flaccid sense but not *notice* or *attend* to it? Had we previously thought that these effects were not injuries at all—or that if they were, they were deserved, considering racial differences? (Such differences are of course not pure matters of fact.) Did our views of the overall situation change because we changed our view of the nondominant class and came to think that they were persons we should respect in certain ways? Did this respect entail an expanded view of what impermissible injury is, requiring removal of its sources? If so, how did this happen? Was it stimulated by vivid events in the Civil Rights movement that made us rethink our evaluations? If so, how did the movement itself begin and why did it receive increasing support from the dominant group? Did the dominant and nondominant groups change their respective views about

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257. See generally Richard N. Boyd, *How to Be a Moral Realist*, in ESSAYS ON MORAL REALISM 181 (Geoffrey Sayre-McCord ed., 1988); Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061; Peter Railton, *Moral Realism*, 95 PHIL. REV. 163 (1986). There is a rather intimidating collection of moral terms that regularly accompany discussions of moral realism, such as “moral facts,” “moral relativism,” and “moral skepticism,” but for present purposes, I aim to avoid them.

258. 347 U.S. 483 (1954). See *supra* note 94 (comparing *Brown* with *Plessy*).

259. See *Brown*, 347 U.S. at 495.

themselves? Was it all a matter of sheer chance in which a particular collection of jurists sat on the Supreme Court when a clear opportunity allowed them to implement their personal moral judgments and constitutional theories? And how did these respected members of the establishment come to these radical positions?

Perhaps others know the answers, but I do not. In any case, the idea that there has been progress in re-interpreting the concept of equality is not totally off the wall. The morally superior sentiments of those in both groups trying to undo what we now recognize as evil were eventually put in operation through formal constitutional interpretation and its applications. These constitutional processes in turn seem to have produced important (if not universal) educative effects. In this sense, there has been an improvement in moral behavior and in moral theory: Many of us have *refined* our *understanding* of equality and *acted* on it.<sup>260</sup>

Perhaps, overall, we can say that whatever facts were or were not uncovered, some influential opinion-molders, judges, and lawmakers had a new normative insight concerning equality, fairness, and justice: "This is part of what 'equality' means—no legal barriers, based on race, to human association. Such barriers ratify the unacceptable judgments underlying the segregation laws, and their very existence as well as their implementation work true harms." Simply being *addressed* by the State (and "the People") in certain ways—"You cannot be in each others' company here!"—was seen to constitute and cause moral and constitutional injury. Our conduct thus reflected some elevation in moral sensibilities, at least on the part of some influential groups, and the insight spread to others. In this limited sense, we "caught up" with what should have been viewed as a basic egalitarian ideal. We recognized and acted upon human needs that had been seen only dimly, if at all.

The *Brown* case may give us something to start with, but it carries us only so far. Where in bioethics can we expect new normative insights, whether inspired by salient facts, conceptual analysis, or assorted firings of the brain? Would expanded research on the effects of varying gestational circumstances, or on the so-called nature/nurture tension, help resolve contests between genetic and gestational mothers? What new facts or thoughts will tell us to whom to assign the next liver when we already know the candidates' medical conditions? Or whether it is permissible to take a kidney from a child in order to save his brother? Or whether one is significantly harmed by having the same genome as someone else who has already lived or is currently in full bloom?

These expressions of optimism may seem a bit labored. If we could say what the mysterious new insights would be, we would already have them, although our behavior might lag. If we do not already have them, they might be a long time coming, if they come at all. For example, with segregation, the *issue*—do equal facilities for separated races satisfy equality standards?—had been understood

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260. Others argue that *Brown* constituted, if anything, moral regress, because the Court's decision was lawless and unjustified on any proper theory of interpreting the constitutional text. The Court, on this view, thus violated some aspect of the Rule of Law ideal. See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

for quite a while before *Brown* was decided. By the time we have our insight, the technological rabbit may be beyond sight.

But, by all means go ahead and get more facts about the impact of gestation on fetal development and maternal-fetal bonding—but also about the feelings and attitudes of genetic parents awaiting the birth of a child they expect to raise. Get facts about the psychological and physical effects of losing a sibling to kidney disease and discovering later in life that the sibling could have been saved if only your parents, or a court, had allowed the transfer of your kidney to her. Get facts about the effects of being born of a genetic plan—cloning, germ-line enhancement engineering, whatever. Of course, we cannot do that too well unless we actually have some cloning, and after we start, it may be hard to stop.

When we get these facts, we may indeed—at least on an individual basis—be aided in reaching closure on some given matter of choice. In particular, the facts may inspire reflection and new perceptions (“Why didn’t I see that before?”). But such facts will not dictate a normative result.<sup>261</sup> No set of facts will determine which mode of distribution of lifesaving resources is the true and correct one, except in the company of moral premises.

In 1971, John Rawls published *A Theory of Justice*. He drew on and sharply revised and extended some important constructs within political and moral theory—ideas such as the social contract, the ideal observer, detachment and impartiality, the need to accommodate liberty with equality, and justice as fair treatment of persons. It is hard to say precisely what is “new” in his work and what is not. However, few philosophers, even those in sharp disagreement with him, would deny the impact and worth of Rawls’s refinement and synthesis of these preexisting tools—perhaps to the extent of saying he fashioned powerful new tools.

Is this a case of progress in philosophy? Is bioethics improved by the installation of these ideas? Why not? If it is a smaller degree of incremental progress than that worked by Aristotle, Plato, and Kant, it is still progress. Matters that were fuzzy before are clearer now, and we have a more precise idea of what is entailed by particular notions of justice, equality, and liberty. Some may even say that calling his work an incremental advance is misleading because he has moved significantly beyond his illustrious predecessors. In any case, the sort of claim that Rawls or others have made progress is reasonably coherent and far from implausible. Perhaps substituting Nozick for Rawls would make the ascription of progress go down more easily for some auditors.

However, as many have noted, Rawlsian analysis does not give us a bunch of right answers to hard questions at all levels of abstraction, and Rawls did not

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261. Cf. Ternasky, *supra* note 208, at 128 (arguing that given a “robust conception of human flourishing” and moral theories that “stand relevantly, approximately, near the truth of that motivation, then we may expect to move nearer the truth as our intuitions are informed by additional social, scientific, and historical evidence.”). I am not sure we are aided by the notion of “moving nearer the truth,” but the point about intuitions evolving with the presentation of new evidence seems sound.

claim it would, although he did deal with a number of specific issues.<sup>262</sup> Try applying his (or anyone's) tool matrix to the "who-is-the-natural-mother" issue of *Johnson v. Calvert*, or to the questions whether we should ban human cloning, allow the use of various performance-enhancing techniques, or solve scarce-resource distribution by this or that mechanism.<sup>263</sup> The most that can be hoped for, in many cases, is that we narrow the range of permissible options, or that we more fully understand and can justify assorted preferences, attitudes, and behaviors, or that we more adequately justify particular plans or prior actions. In some cases, the Rawlsian analysis not only offers an overarching structure of general application, but indeed yields strong answers to some problems, at least within the framework of Western thought. However, it seems unreasonable to expect any political or ethical theory, whatever its internal philosophical constructs, to tell us, say, whether the entire nation, rather than regions or localities, should be the constituency for organ distribution. Nor will it tell us, after human enhancement techniques become effective, precisely to whom increments in intelligence or other merit or wealth-attracting attributes should go.<sup>264</sup>

If *Brown v. Board of Education* and Rawls's *Theory of Justice* constitute or reflect progress, what is it progress in? How do we describe it, especially to skeptics who think of progress as referring to new proofs in mathematics or logic, or theory confirmation in science, or paradigm shifts that pan out empirically, or setting new records in the 100-meter dash? Should we refer to it as "progress in the quality and sophistication and relative completeness of analysis, such that it is likelier to draw assent"? There is a sense, after *Brown* and *Theory of Justice*, in which we know more than we did before about equality, about how to think about constructing political/economic/social systems, and so on. As has been said of metaethics: "Such philosophical progress as has been made in metaethics has come not from simplifying the debate or reducing the number of viable alternatives, but from bringing greater sophistication to the discussion of well-known positions and from exploring heretofore disregarded possibilities and interconnections."<sup>265</sup>

Rawls himself provides an account of what we might rightly call "progress": "If the scheme as a whole seems on reflection to clarify and to order our thoughts, and if it tends to reduce disagreements and to bring divergent convictions more in line, then it has done all that one may reasonably ask."<sup>266</sup>

There is thus a bounded but plausible account of progress in moral and legal

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262. See RAWLS, *supra* note 195, at 53 (stating that if his scheme adds clarity and order in our thinking and reduces disagreement, it has served its purpose). See also John Rawls, *The Basic Liberties and Their Priority*, in POLITICAL LIBERALISM, 289, 340-68 (1993) (discussing political free speech and commenting on several major cases and constitutional standards).

263. See *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

264. See generally Michael H. Shapiro, *Who Merits Merit? Problems in Distributive Justice and Utility Posed by the New Biology*, 48 S. CAL. L. REV. 318 (1974).

265. Darwall et al., *supra* note 67, at 32.

266. RAWLS, *supra* note 195, at 53.

argumentation and analysis that rests on ideas of normative illumination and increasingly refined analytical tools. That sort of progress may play some role in behavioral progress, and behavioral progress may, in turn, aid insight. This account probably does not meet the expectations of those who call for law and philosophy to catch up with science and technology, but nothing can.

c. “*Micro*” vs. “*macro*” progress: *Personal moral “closure” and objective moral progress*.—Think back to your own difficulties in decision making, whether it was to decide which concert or movie to attend, whether to vote to hire or promote someone, or what advice to give your children on moral issues. Some aspects of these problems, including your personal circumstances, may well have been especially salient to you and more or less settled your mind. This is perfectly consistent with continued reservations or even regret over what you did or “had” to do, and with a realization that the issue was not settled for all time, whether for you or for others generally.<sup>267</sup>

This is obviously not a general summary of human decision making. I am suggesting only that reflection may, for a given person, help decide the matter for her.<sup>268</sup> It is immaterial whether one describes the final resolution of doubts as involving a particular consideration that tipped the scales, or as the result of a rough weighing or balancing. Much the same may hold, with various complexities, for group decision making by ethics committees, Institutional Review Boards, juries, and so on. This notion of (provisional) settlement is a

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267. Cf. Railton, *supra* note 257, at 188-90 (discussing a theory of individual rationality, and following this with a discussion of moral norms going beyond individual viewpoints—rationality from what might be called a social point of view). In a footnote, the author observes that “there can be no guarantee that what would be instrumentally rational from any given individual’s point of view will coincide with what would be instrumentally rational from a social point of view.” *Id.* at 190 n.30. See generally Simon, *supra* note 85 (discussing cognition in judicial problem-solving).

268. Once again, this is not an account of or argument for standard moral relativism, although it is plausibly, if nonetheless confusingly, referred to as justificatory relativism. See Brock, *supra* note 4, at 236-37. Brock states that his

account of moral reasoning and justification . . . , which employs a critical screening process together with reflective equilibrium, does allow for the possibility of moral disagreement that is in principle rationally irresolvable, and for the possibility that different individuals may each be justified in holding incompatible moral judgments; we can call this justificatory relativism. . . . Some moral disagreement does, I believe, turn out to be irresolvable in principle, but not as often as many people today suppose. Very often disagreement that initially appears to be moral turns out on closer analysis to be empirical disagreement about matters of fact. [¶] Justificatory relativism implies that moral judgments are correctly understood to be in one sense subjective. . . . What I have in mind here by the claim of subjectivity is this. At the end of the day, . . . after the process of moral reasoning and justification has been completed, a particular individual’s moral judgments, principles, or theory will depend on what that person is prepared on reflection to accept, to try to live by, and to judge him-or herself and others by.

critical aspect of making decisions. Thus, despite rational reservations such as Robert Holmes's—"more should not be expected of it [analytical ethics within bioethics] than it is capable of delivering"<sup>269</sup>—such analytics may be strongly decisive for an individual decision maker, even if the underlying moral issues are not settled within any overall moral theory either from her viewpoint or that of others.

Examples are not hard to imagine, though they are more difficult to confirm empirically. Suppose there is a terminally ill patient who had been unusually energetic but has suffered prolonged, intractable depression during prior illnesses. She now wishes to terminate artificial nutrition and hydration. How do we assess and respond to her preferences? We invoke rough ideas of autonomy-as-opportunities-to-realize-one's preferences, and of relief of suffering. This may occur within a nonconsequentialist or consequentialist moral theory. What strikes you as especially compelling is the ongoing, impenetrable depression of the patient, making every day an utter horror, that is unresponsive to all medications and even to electroconvulsive therapy. So far from this condition being a plausible blockade to aid-in-dying, because of its distorting effect on the perception of one's own preferences, it is now an indication for it. So you think it best to let her, or even help her, go.

This is a conclusion that one might not have reached, or might have reached more reluctantly, if one had not been introduced to ideas of impaired decision making capacity, of clinical depression as a disorder that entails pain unimaginable to those never so afflicted, of the possible transformative effects of biological treatment, and of the bitter fact that these transformative treatments failed completely. Simply learning these ideas and facts may advance individual progress to provisional closure. This view may endure even if the decisionmaker knows of the risks of undue influence or abuse.

Think next of someone who applauds the latest successes in multiple transplants, where several organs are distributed to a single person. Someone else points out that multiple transplants given to just one person do not generally maximize lifesaving. Even if one continues to support multiple transplants, one recognizes the pull of other considerations when one had not done so before. This too is progress.

Problems, of course, are not of equal difficulty or gravity. However, reflection may significantly advance equilibrium for particular persons or groups, even though most of the overarching moral tensions can never be resolved. Perhaps this is a form of reflective equilibrium,<sup>270</sup> and easing the way for it promotes both personal and community progress.<sup>271</sup> For the persons directly on

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269. Holmes, *supra* note 15, at 145.

270. See RAWLS, *supra* note 195, at 48-51 (defining reflective equilibrium); see also Brody, *supra* note 20, at 172-74, 177-78 (applying the concept to bioethical deliberation); Railton, *supra* note 257, at 190-94 (discussing individual and social rationality in connection with the idea of moral realism).

271. See generally Nagel, *supra* note 11, at 202.

[M]ost theorists would recognize, as characteristic of morality, the aim of convergence

the job of decision making, reservations about ultimate moral reality may be of some moment because of anticipated regret concerning the factors outweighed but far from annihilated, and because of fears that future problems may resist all closure.<sup>272</sup> However, this is largely inevitable in many domains of thought.

### 3. Progress in Bioethics.—

#### a. Conceptual constraints on the idea of progress.—

(i) Again, the example of principlism.—Recall the references above to principlism, understood as a plan for evaluating actions and situations in light of mid-level moral imperatives. Its central thrust is to advance moral and legal decision making by referring largely or exclusively to a small set of concepts.<sup>273</sup> More specifically, it involves “what has sometimes been called the four-principles approach to biomedical ethics, and also called, somewhat disparagingly, principlism.”<sup>274</sup> The four “clusters of principles” are respect for autonomy, which entails respect for a competent person’s decisions; nonmaleficence or, a bit loosely, not causing harm; beneficence, or generating benefits, balanced against risks and costs; and justice, understood as fair distribution of benefits, risks and costs. These abstractions are used to illuminate and resolve certain disputes. Beauchamp and Childress contrast “principles”

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by individuals with diverse and conflicting points of view on standards of conduct and choice which all can see as justified. Morality, if there is such a thing, requires us to transcend in the practical domain our individual perspectives, and by means of this collective transcendence to converge on a common standpoint of evaluation. It aims to supply a framework of potential agreement or harmony within which the remaining differences can operate without doing harm.

*Id.*

Later, Nagel refers to “formulating general hypotheses and testing them by the credibility of their implications,” finding reasons for different opinions and the principles they depend upon, and concluding that “progress can often be made on this basis—at least to produce greater understanding of the grounds of disagreement, if not to resolve it finally.” *Id.* at 211. See also Brock, *supra* note 4, at 217 (discussing ethics commissions’ efforts toward “sharpening the issues” and “forging consensus”).

Consider the moral evolution of Andrei Sakharov over a period of about two decades, as recounted in Gennady Gorelik, *The Metamorphosis of Andrei Sakharov*, 280 SCI. AM. 98, 101 (1998): “‘If I feel myself free,’ [Sakharov] once mused, ‘it is specifically because I am guided to action by my concrete moral evaluation, and I don’t think I am bound by anything else.’ He always did exactly what he believed in, led by a clear, unwavering inner morality.”

But it is clear from the earlier portions of the article that Sakharov didn’t simply intuit moral reality in a moment of time and act as an absolutist. His recognition of conflicting obligations, patriotic and global, developed as he witnessed historical developments and saw the growing risks of nuclear weapons. His development is thus arguably an example of personal moral progress.

272. See Williams, *supra* note 122, at 49.

273. Principlism’s origins are often associated generally with WILLIAM K. FRANKENA, ETHICS (2d ed. 1973) and, in bioethics, with the first edition (now into the fourth) of TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS (4th ed. 1994).

274. BEAUCHAMP & CHILDRESS, *supra* note 273, at 37 (footnote omitted) (emphasis omitted).

with ethical theory (which is more abstract than principles), rules (less abstract), and particular judgments.<sup>275</sup>

Are the principlists' offerings progress? Even opponents of principlism should think so. Any crystallization of ideas that helps explain how we think (e.g., with heuristics and other shortcuts),<sup>276</sup> and gives people a conceptual map addressing how we should think, may be an advance. Even if it is mistaken and ultimately incoherent, it takes us down cognitive pathways we may have missed, and we can choose which forks to follow on our own. One learns something from principlism even when rejecting it.

The law provides a brief example. The identification of standards of review in constitutional litigation helped define and implement various hierarchies of constitutional rights, powers, duties, etc., and helped organize and clarify both what we were doing and what we should have been doing.<sup>277</sup> It is not a principlist system of the sort dealt with here, but it generally deals with mid-level abstractions in adjudicating constitutional claims. Thinking about the nature of standards of review, why they are in place, and what they do and are supposed to do is instructive, whether or not one thinks the way these standards are used or expressed is mistaken. Instructive on what? On matters of constitutional or moral relevance that we may have over- or underlooked.

There are obvious risks in this largely mid-level evaluation process. In constitutional law, many have stressed the risks of clumsy, possibly question-begging use of standards of review. Critics have also condemned the implicit constitutional hierarchies that they reflect, but their own preferred orderings would still have to be reflected in standards of review.<sup>278</sup> Critics of principlism have tendered parallel objections. As long as we understand some basic limitations of principlism, however, the principlists' schemas may accelerate our personal decision making efforts as well as our agreement with others. This may represent a kind of moral efficiency; one can be efficient or inefficient in moral deliberation, and efficiency here may itself be a moral imperative, depending on the circumstances.<sup>279</sup> As for principlism's limitations, they are readily stated:

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275. *Id.* at 15, 37-38.

276. I am using these terms loosely—for some, perhaps too loosely. One might urge, for example, that a decision procedure in a given case was not a “shortcut” because no material and useful consideration was excluded; there was in fact no longer journey to greater accuracy—high theory would not have advanced deliberation.

277. I do not want to press the comparison between standards of review and principlism too far. It is not clear that they operate at the same level of abstraction. Moreover, standards of review are not articulated by specific reference to principles of any sort, although the standards may presuppose abstractions properly called “principles.” The standards of review themselves, however, do not seem to be akin to the structures contemplated by principlism. Perhaps they are more like casuistical rules, maxims, or apothegms, or heuristics generally.

278. The point is that, given interpretive maneuvers that yield an ordering of constitutional values, standards of review that reflect this ordering are a logical inevitability.

279. I note this for the sake of completeness. “Efficiency” is a general term concerning the relationship between ends and means, and it is far from exclusively linked to matters of commerce,

one's heuristics are not the final word. In some cases, appeal must be made to higher-order abstractions to interpret the moral premises and to help resolve conflicts among them. One may even have to de-select principles or reinterpret them. Moreover, the very articulation of principles may fool one into thinking that things are simpler than they are.

So, principlism is not the chopped liver of moral philosophy; its problems are serious.<sup>280</sup> Are its specified criteria sufficiently, but not excessively, comprehensive? One wonders whether equality is rightly assigned to the discussion of justice or to some other combination of the itemized concepts. Where does fairness go—inside justice,<sup>281</sup> or inside equality, wherever that may be? Are the criteria overbroad, underbroad, or void for vagueness, i.e., too sweeping, too narrow or incomplete, or too imprecise to be serviceable? When do they produce reasonably determinate results or at least narrow the range of competing arguments? What are “principles” anyway and where do they come from and how do they relate to each other, to higher abstractions, to lower abstractions, to standards, rules, maxims, apothegms, and bromides? If the principles in principlism were not randomly assembled, then what overarching theory produced them, or are they simply inferred from how people in fact make decisions, with no additional search for foundations? Moreover, the principles within “principlism” are imprecise, overlapping, often pull in different directions, and have internal tensions that put their very coherence at risk. Don’t we have to invoke the underlying moral theory to deal with such difficulties, if they can be dealt with at all? If there is no such thing as independent freestanding principles, in short, how did we come by them? Is autonomy a product of a consequentialist or nonconsequentialist theory? If autonomy derives from different theories, does its applications vary, not just with the particular situation,

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as some careless critics think. More generally, it embodies rules of rationality. If someone residing in Los Angeles wishes to visit the Pacific Ocean forthwith, she should, other things remaining the same, move westerly rather than circumnavigating the globe by traveling eastward. In moral analysis, efficient moves are obligatory, where efficiency represents the use of methods that under the circumstances are the best means of satisfying the requirements of the governing moral theory. Of course, this account reduces efficiency to the content of the moral theory and its applications, and there is usually no need to invoke the idea explicitly when doing moral analysis.

280. For a critique of principlism, see Ronald M. Green et al., *The Method of Public Morality Versus the Method of Principlism*, 18 J. MED. & PHIL. 477 (1993). For a response to various criticisms of principlism, see BEAUCHAMP & CHILDRESS, *supra* note 273, at 106-09.

281. See BEAUCHAMP & CHILDRESS, *supra* note 273, at 326-34 (identifying “the principle of formal justice” with the “principle of formal equality,” and indicating that in deciding particular questions, e.g., admissions to a hospital, “[a]ny answer to this question will presuppose an account of justice that contains material principles in addition to the formal principles”).

Note the extensively-discussed issue of the “emptiness” of equality in constitutional law. Compare Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982), with Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983). On the location of fairness on the principlist conceptual map, see BEAUCHAMP & CHILDRESS, *supra* note 273, at 327, 341-43 (discussing fair opportunity).

but with the parent theories? If the applications vary with their foundations, why should we bother with this intermediate stage of governance by principle at all? Because higher theory does not have to be invoked in every case and we can do some coasting? In which cases does it (not) belong? The principles, then, require interpretation, internal reconciliation, and reconciliation with each other, and the only way to do so is to test the authority and meaning of the principles in light of higher-order concepts of ethical theory.

Think again of autonomy to illustrate this point. It is a concept with internal tensions that often confront us, and its various aspects are not accorded the same ranking by everyone. If a patient wants to delegate an important value-laden decision to his physician, should we follow his preferences, vindicating one aspect of autonomy? Or should we instead stress autonomy as rational self-direction in order to discourage the delegation, and implement this goal by adjuring physicians to reject such delegations and insist that the patient make his own decision? If a prospective organ donor expresses assent to the donation of her kidney to a relative but seems conflicted, should the donation be disallowed because of the risk that assent was compromised by familial pressure, undue influence or coercion? Autonomy is threatened either way. We already noted the problem of overriding a competent patient's veto of therapy mental disorder in order to promote her long-run autonomy. More precisely, this compromises her external autonomy (freedom from the interferences) in order to promote her internal autonomy (her capacities, impaired by disorder), which in turn will enhance her external autonomy down the line.<sup>282</sup>

Despite such critiques of principlism, which are well known to the principlists, it is fair to refer to it as reflecting progress. Again, what sort of progress? The sort of progress involved in deciding if a scholar's publications have "advanced the field" and are therefore tenure-worthy? Nonacademics might be excused for questioning this as a standard of progress. Perhaps principlism represents some methodological insights that reveal its principles as crystallizations of concepts derived from one or more higher-level theories that can be used as heuristics or very soft algorithms. Perhaps it is a sort of acceptable moral satisficing, even an obligatory one, given scarce resources of time and effort. If an admittedly soft shortcut helps reach rough consensus, isn't this an advance? Scarce resources may indeed demand satisficing, and principlism may be effective in some cases. Why reinvent the moral wheel at every turn? Of course, if the problems seem simple, we are unlikely to feel a need even to review the relevant principles, never mind the larger abstractions.

However, as critics have repeatedly charged, the principles cannot simply be fitted onto a situation to yield a determinate result. Some say there is no such thing as manageable principles in the sense the principlists require, or they cannot really be applied, as a true algorithm can.<sup>283</sup> (Principlists of course do not

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282. See Shapiro, *supra* note 121 for further discussions of this issue.

283. This is more or less the objection made by Clouser & Gert, *supra* note 212, at 226-27 ("[T]his 'principle' [of beneficence] is simply a chapter heading under which many superficially related topics are discussed; it is primarily a label for a general concern with consequences. But

say they are constructing algorithms, which are quite different from principles.) Such algorithms often provide determinate results in application, such as computer programs for playing tic-tac-toe, or, more impressively, chess. Principles rarely do.

To clarify, organize, and add perspectives and insights hitherto hidden are all forms of progress, and they may indeed advance the time when some answer is settled upon, and we can move on to other matters. Such advances are important, but they should not be overstated. After a time, one grows weary of clarifications that better acquaint us with our confusion but do not provide satisfying answers.<sup>284</sup> However, if clarification<sup>285</sup> helps move us toward even partial or

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by being called a principle, it avoids the kind of fundamental questioning that a theory should undergo.”). *See also id.* at 234-36.

[T]here is neither room nor need for principles between the [adequate, unified moral] theory and the rules or ideals which are applied to particular cases. Rather, one applies the relevant rules and ideals and then, after taking into account all of the morally relevant features, one decides whether or not it is justified to violate a particular moral rule. . . . We believe, in the sense given to ‘principle’ by Frankena and by Beauchamp and Childress, that for all practical and theoretical purposes there are no moral principles. . . . By invoking several ‘principles’ they implicitly deny the unity of morality.

*Id.*

284. Robert Holmes also questions a similar defense of “elucidation.” *See Holmes, supra* note 15, at 144-45. Note, however, the remarks in the text suggesting that individuals might find personally satisfactory solutions when aided by morally relevant considerations they had not thought of. *See generally JONSEN & TOULMIN, supra* note 7, at 305.

[T]aken by themselves, disputations between ‘consequentialists’ and ‘deontologists,’ or between Kantians and Rawlsians, were not of much help in settling vexed practical issues, such as the question, ‘How much responsibility should physicians allow gravely ill patients [] in deciding what treatments they shall undergo?’ Philosophical *concepts* may be of help in clarifying the manner and terms in which these problems are stated. But in the end the debate will always return to the particular situation of an individual patient with a specific medical condition, and the discernment that is needed to reach any wise decisions in such cases goes beyond the explanatory or clarifying insights of even the best theories—whether scientific insights of molecular biologists or ethical perceptions of moral philosophers.

*Id.* (footnote omitted).

285. Cf. Nagel, *supra* note 11, at 209 (remarking that “[t]he present state of moral controversy reveals a high level of uncertainty about both methods and conclusions, but at the same time there is clearly a lot of value in the three primary standards I have described: common interest, overall utility, and equal rights. On some questions, these standards will give the same answer.”). Without pressing the comparison, one can make parallel claims about principlism, though it seems to be at a lower level of specificity.

But cf. Michael Bishop, *The Possibility of Conceptual Clarity in Philosophy*, 29 AM. Phil. Q. 267, 268 (1992) (arguing that “[c]lassical conceptual analysis” in the form of specifying necessary and jointly sufficient conditions “is doomed because most concepts are not structured classically.”).

temporary settlements, the effort required may be worth it. In many cases, nothing more than these provisional accommodations are logically possible for philosophical analysis or legal decision making.<sup>286</sup> We will forever be using familiar tools, perhaps with innovative refinements and reconstructions. But no set of tools will bring us to moral or legal closure that matches what can be accomplished in mathematics, logic and science. The kind of provisionality that applies to even the best-confirmed scientific claims does not suggest the contrary; it is quite different, despite the parallels, from moral indeterminacy. No doubt, these defining differences move some to view philosophy and law as fields inferior to science and mathematics, a view not worth stopping on, except to say that using the term "inferior" begs a lot of questions, and, in any case, we have to live with what we have.

(ii) *The example of distributing scarce lifesaving resources, especially organs: When paradox blocks "progress"; lotteries and rationality.*—Scarcity is a central driving force of life. Distributing scarce lifesaving resources to human beings is not amenable to the relatively simple solutions to, say, dividing a cake at a birthday. Lifesaving are rarely distributed in ways that simultaneously satisfy everyone. The image of triage is a searing one, and although that concept is not directly applicable to all distributional problems, it is easily brought to mind when scarce lifesaving resources are at stake, whether on the battlefield or the civilian hospital ward.<sup>287</sup> Some of the most vivid examples of this come from organ transplantation and use of artificial organs such as dialysis machines and, one anticipates, implantable artificial hearts. Indeed, the problem of selecting patients to receive the first operationally useful dialysis machines was a defining moment in the early development of bioethics.<sup>288</sup>

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But few of our powerful moral, philosophical and legal abstractions can be part of classical conceptual analysis in this sense. Most ethical and legal theory is thus nonclassical in the author's sense. Non-classical proceedings, however, can yield incremental clarity for such non-classical concepts.

286. Some authors draw clinical uncertainty into the analysis. See, e.g., Toon, *supra* note 34, at 17.

It is foolish to believe that a knowledge of moral philosophy or an ethical analysis makes a difficult moral decision easy, any[]more than knowledge of physiology and pathophysiological analysis makes a complex clinical case simple to diagnose or to prognosticate. In both cases[,] *ars longa vita brevis*. What sound training in philosophical analysis can do for moral problems is exactly parallel to what training in clinical sciences can do for the diagnostic problem: i.e.,[.] provide a framework in which choices can be organised and evaluated logically, avoiding conclusions not justified by the evidence and decisions made on irrelevant grounds.

*Id.*

287. The decisions are likely to be sharply different in military and civil contexts. See generally GERALD R. WINSLOW, TRIAGE AND JUSTICE (1982).

288. See Sanders & Dukeminier, *supra* note 141, at 371, 377-79; see also ROTHRMAN, *supra* note 6, at 155-57.

Here, as elsewhere, we have made a series of pragmatic accommodations despite our moral uncertainty. Indeed, we are morally obliged to proceed in some way even if moral considerations fail to identify the best options.<sup>289</sup> However, no set of criteria has ever commanded a consensus that identifies the correct premises governing distribution of lifesaving resources. These premises would specify all the required, permitted and forbidden distributions. But the limitations of any known set of criteria for determining distribution have been reviewed many times.<sup>290</sup> Whatever the meta-ethical views; whatever the general ethical theories, whether consequentialist, nonconsequentialist, or *tertium quid*; whatever the particular theory or its sub-branches; and whatever the particular criteria—none can satisfy all moral theories or observers, ideal, reasonable, or otherwise. Social worth, ability to pay, prior good works, degree of medical need, and inherent or acquired merit are all failed criteria as decisive sources of guidance, but remain morally relevant. One might call this impossibility a moral theorem of sorts, but trying to formulate a proof would be bootless, and in any case not to the point. Check any operational set of criteria, e.g., the federal guidelines for heart transplantation, and this claim will quickly be illustrated. These heart transplantation guidelines,<sup>291</sup> which apply to federally funded transplants, specify the need for social support networks, thus making it hard for those who live in relative solitude to receive a transplant; discourage transplants to overage persons; and say nothing about maximizing utility and so on. Decisions are taken and specific complaints are rare. But if complaints and recommendations are made, say, to equalize patients' opportunities, what exactly gets equalized and how? The ratio of medical need to chance of getting the next transplant? On what measure of need? Imminence of death before transplant?

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289. See generally David B. Wong, *Coping with Moral Conflict and Ambiguity*, 102 ETHICS 763 (1992) (arguing that “[a] complete ethic should address the question of how people are to act toward one another when they are in serious moral disagreement. . . . [A]ccommodation is a moral value rooted in the fact that serious conflict is a regular feature of our ethical lives.”).

290. See, e.g., BARBARA GOODWIN, *JUSTICE BY LOTTERY* (1992); James F. Childress, *Who Shall Live when Not All Can Live?*, 53 SOUNDINGS 339 (Winter 1970); Albert R. Jonsen, *Ethical Issues in Organ Transplantation*, in MEDICAL ETHICS 229, 231 (Robert M. Veatch ed. 1989); Teri Randall, *Criteria for Evaluating Potential Transplant Recipients Vary Among Centers, Physicians*, 269 JAMA 3091 (1993); Nicholas Rescher, *The Allocation of Exotic Lifesaving Therapy*, 79 ETHICS 173 (1969).

291. See Health Care Financing Administration of the U.S. Department of Health and Human Services, *Heart Transplant Coverage*, in 1 MEDICARE & MEDICAID GUIDE 1 CCH ¶4030.30(D) (Aug. 11, 1994). The criteria for patient selection include critical medical need; maximum likelihood of successful clinical outcome; very poor prognosis without transplant. Adverse factors include advancing age; various concurrent diseases; and a history or behavior pattern or psychiatric illness likely to interfere significantly with medical compliance. ¶4030.30(D)(4) states: “We recognize that some who may not be considered ‘good candidates’ may also benefit, but the likelihood or extent of benefit is significantly less.” The United Network for Organ Sharing (UNOS) guidelines do not seem as rigorous. See UNOS Allocation Policy 3, June 26, 1998 <<http://www.unos.org>>.

Life expectancy after the transplant? Expected quality of life with the transplant? Or are we instead to equalize the ratio of social worth to chance of receiving the next transplant? Are we to work with some ordered set of these variables, or are we now simply replicating the list of failed criteria?

Consider now the very useful example suggested by Annas concerning distribution of a fixed number of fully implantable artificial hearts.<sup>292</sup> His *Minerva* case concerns a lottery as the final selection mechanism, a form of being “unprincipled on principle,” to import Bickel’s phrase into this context.<sup>293</sup> Obviously, some of the same difficulties we just encountered are built into the prior threshold decision to the number of hearts to be constructed and made available. They are also at work at the stage where persons are included or excluded from the lottery pool. Membership in the lottery constituency is thus itself a scarce resource that must be distributed before the implants are assigned.

A lottery might seem to be the very antithesis of rational moral choice based upon ideals of personhood. Moral rationality adjures us to find a reason to select

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292. See George Annas, *Allocation of Artificial Hearts in the Year 2002: Minerva v. National Health Agency*, 3 AM. J. LAW & MED. 59 (1977).

293. Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 76 (1961). For both analytic and entertainment purposes, see Jorge Luis Borges, *The Lottery in Babylon*, in LABYRINTHS: SELECTED STORIES AND OTHER WRITINGS, at 30 (Donald A. Yates & James E. Irby eds., story trans., John M. Fein, 1964).

I come from a dizzy land where the lottery is the basis of life. . . . Their [the older lotteries in which people won silver coins] moral virtue was nil. They were not directed at men's faculties, but only at hope. . . . If the lottery is an intensification of chance, a periodical infusion of chaos in the cosmos, would it not be right for chance to intervene in all stages of the drawing and not in one alone? Is it not ridiculous for chance to dictate someone's death and have the circumstances of that death—secrecy, publicity, and the fixed time of an hour or a century—not subject to chance?

*Id.* at 30, 31, 34. See also the short story, SHIRLEY JACKSON, THE LOTTERY (Popular Library ed., 1949).

In real life, lotteries for scarce medical resources are used rarely, apparently mostly for new drugs in short supply. Even then, they are viewed as short-lived phenomena. Supplies of therapies proved useful can generally be expected to increase, thus moving distribution into its usual forms. See Michael Waldholz, *Unit of Roche Sets Up Lottery for AIDS Drug: Enough for 2,280 Patients Will Be Given Out Free Under Pact with FDA*, WALL ST. J., June 21, 1995. But see *New AIDS Drugs Spawn a Global Pill Chase*, WALL ST. J., July 8, 1996 (“France, where 30,000 people have died of AIDS, is a front-line battleground for getting the drugs approved and distributed. Earlier this year, France's National AIDS Council suggested holding a lottery among patients to determine who would get the scarce protease drugs. The idea triggered outrage and protests.”). See also Tamar Lewin, *Experimental Drug Is Prize in a Highly Unusual Lottery*, N.Y. TIMES, Jan. 7, 1994, at A1 (quoting one patient's suggestion that “it might have been fairer if people who've had the disease longer, and are in worse shape, got it first.”) A physician said that “patients were generally very supportive of the idea. Some of the doctors were less so, because they thought they should be able to choose which patients to put before which others.”). See generally Ralph P. Forsberg, *Rationality and Allocating Scarce Medical Resources*, 20 J. MED. & PHIL. 25 (1995).

one person over another. However, every reason and set of reasons fail as decisive criteria of selection for lifesaving. Even if some reasons succeed from the decisionmakers' viewpoints and the selections are made, the distributional scheme, whatever it is, will be unacceptable to various major segments of the public. What does moral rationality tell us when moral rationality based on finding relevant differences among persons needing lifesaving resources fails at every turn? Quit the project and let them all die?<sup>294</sup> The options seem inconsistent with one of our moral heuristics—a strong presumption for lifesaving.

One would think, given this apparent failure of our system of moral rationality, that metaethical rationality would require us to revise our understanding of moral rationality, which should forbid differentiating among persons needing the resource. Instead, we should use an objective procedure that suppresses differences, perhaps by some randomization device. Because first-come, first-served seems too linked to one's social position and wealth, a lottery seems appropriate, perhaps even morally mandatory, despite the serious moral issues concerning entry into the lottery pool.

To most persons, lotteries of this sort seem morally outrageous. Lotteries are deliberately inattentive to individual variations within the included group. We thus have the maddening situation in which the chief moral deficit of a plan coincides with its chief moral merit—the suppression of interpersonal differences. The personhood of the lottery participants is suppressed, one might say, and they are treated as fungible, though not as objects: we would not be facing a grave distributional difficulty if they were mere objects. Respect for personhood, a critical aspect of moral rationality, demands otherwise. Something as valuable as human life cannot turn on the arbitrariness of pure random chance. It suggests human life is no more valuable than winning at roulette. It appears to make life contingent on essentially nothing at all—that is, the morally irrelevant difference of whose number was drawn—and so devalues it. This perception of illicit contingency is amplified when the lottery is run by the government. Although the government is “ours” in a republic, it may appear still as a voice from above stating that society is unwilling to divert sufficient resources from other areas in order to save lives in the area at hand. This view is irrational when the alternative uses of the resources are other forms of lifesaving, but these other forms may be less salient, and thus barely noticed. Thus, although suppressing differences in assigning voting rights in general elections is required by personhood ideals, suppressing them when distributing lifesaving resources is, on the anti-lottery view, inconsistent with those ideals.

We are thus back to individual differences. A qualified proposition seems plausible: moral rationality requires attention to some interpersonal differences

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294. See generally Fred Rosner, *Managed Care: A Contradiction or Fulfillment of Jewish Law* <<http://www.ijme.org/Content/Transcripts/Rosner/rmanagedcare.html>>, at 8 (the view that this may be a preferred outcome, and citing to the discussion of a “lifeboat ethics” problem in a Talmudic source).

in some contexts, and inattention to other differences in other contexts. Extreme age and debility is a difference that most would accept as a reason for withholding organ transplantation. Being a member of one racial, ethnic, or gender group rather than another is not an acceptable reason, unless there is a link to medical concerns, and if so, it is the idea of medical concerns and not that of group membership that forms the criterion.

In a sense, we are being whipsawed from one “lottery” to another. If we reject lotteries crafted by humans as well as objective schemes that favor those with superior access to health care, we are left with the natural lottery—that complex of genetics, gestation, and post-birth environment that wires in our attributes and substantially affects our opportunities. But relying on attributes derived from the natural lottery is what failed us in the first place. The two regimes of chance represent different sorts of arbitrariness, but under either sort, lifesaving rests on criteria that many believe are not morally relevant. In the artifactual lottery, in particular, life appears to be contingent on morally irrelevant differences among persons—differences having nothing to do with their separate, individuated personhood. Consider, however, what happens when we turn back to differences that define individual personhood—the variations that mark our separate identities as persons and our relative merit and desert. We find that we cannot bear to doom persons to death because of the very same interpersonal trait differences that move us to respect individual personhood: this person is smart, this one is sweet, this one is a wretch, and so on.

The cycle is now complete; we have been thrown from end to the other. Respect for persons, in our lifesaving context, requires us to consider certain interpersonal differences, and also prohibits us from doing so. The only possibility for redemption lies in sorting these differences, identifying which of them must/may/must not be suppressed/addressed. Distinguishing elections (where we generally suppress traits) from choosing mates (where we search for distinguishing traits) raises no contradictions in the ordinary run of cases. Lifesaving, however, is harder to characterize. One might say that lifesaving is so important that it *cannot* be left to chance; or that it is so important that it *must* be left to chance. Moral rationality seems to require two inconsistent paths; therefore, moral rationality is false. The virtue of the contrived lottery is its vice; the vice of the natural lottery is its virtue; and partially objective schemes combine the worst of both systems—although the latter have endured as the least worst of our options. The very logic of personhood fails as a moral guide, or some might think.<sup>295</sup>

What are we supposed to do about this? How do we make progress here? It is no answer to say that these opposing vectors concerning selection for

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295. See PAUL A. FREUND, *Introduction to EXPERIMENTATION WITH HUMAN SUBJECTS* at xvii (Paul A. Freund ed., 1970), quoted in GERALD R. WINSLOW, TRIAGE AND JUSTICE 103 (1982). “The more nearly total is the estimate to be made of an individual and the more nearly the consequence determines life and death, the more unfit the judgment becomes for human reckoning . . . .” Winslow adds: “On this view, truer testimony to the dignity and worth of each individual’s life is borne when human judgment about the relative value of it is kept to a minimum.” *Id.* at 103.

lifesaving are in part culturally relative. For one thing, moral relativity does not follow from cultural relativity. For another, however one designates this audience's main culture, we are in it.

Seeing these moral difficulties might count as progress, although, again, this is not very satisfying. We now have a clearer idea of the structure of our difficulty. Knowing that we may be involved in systemic inconsistency is better than not knowing it. Still, there is an abundant literature on the virtues of obfuscation, delusion, and the maintenance of ambiguity.<sup>296</sup> Perhaps it is better for elderly persons, and for the community, to think that they are being excluded from dialysis for medical reasons rather than because of age. Was it progress or regress when the exclusion was exposed?<sup>297</sup>

Perhaps progress of a sort occurs when consensus forms, even if the content of the consensus is no more or less rational than the competing views. In some cases, the consensus may mark agreement on what passes for the foundations of the social and political system in which they live. For whatever reason, whether historical accident or some aspect of human cognition, we might come to agree that lotteries for lifesaving are permissible or even required. Or we might delegate the choice to seers thought to have special access to moral truth, or to judges of a similar bent who can link moral truth to legal truth. It is common in human decision making to remit confusing problems to a "black box" that emits decisions after a hidden or internal process (think of juries or even markets), or simply to leave things to those formally anointed as possessing expertise.

Some decisional problems may "disappear" if society is radically transformed, say, by rejecting republicanism in favor of a single source of power presumed to have privileged access to knowing what is best for us. This is yet another black box procedure. At least one commentator suggests that some bioethical problems stem from our commitment to liberalism. In any event, Ezekiel's remarks are a partial characterization of the distinguishing attributes

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296. See generally SECULAR RITUAL 3, 22 (Sally F. Moore & Barbara G. Myerhoff eds. 1977). See also GUIDO CALABRESI & PHILIP BOBBIT, TRAGIC CHOICES (1978) (tracing, throughout the book, instances of masking or suppressing moral contradictions and anomalies in distributing scarce benefits and burdens).

297. See generally HENRY J. AARON & WILLIAM B. SCHWARTZ, THE PAINFUL PRESCRIPTION: RATIONING HOSPITAL CARE 89-112 (1984).

[T]he British physician often appears to rationalize, or at least to redefine, medical standards so that he can deal more comfortably with resource constraints. . . . Most patients in Britain appear willing to accept their doctor's word if he says that no further treatment of a particular disease is warranted. This passivity may stem from lack of knowledge about possible treatments or simply from a patient's respect for the physician's authority.

*Id.* at 100.

On the public exposure of this system, see Norman G. Levinsky, *The Organization of Medical Care: Lessons from the Medicare End Stage Renal Disease Program*, 329 NEW ENG. J. MED. 1395, 1398 (1993) (stating that patient-advocacy groups have exerted sufficient pressure on the British health system "to reduce the barrier to dialysis for older patients").

of bioethics:

[T]he most striking characteristic of discussions of medical ethical questions is their persistent irresolution. It is not just that [questions raised concerning treatment of AIDS patients—nontreatment, medical costs, and so on] are hard and require tentative and subtle answers. . . . The ethical framework in which these medical ethical discussions and debates occur seems to ensure no agreement. To put it another way: within the last two decades or so, medical ethical *questions* have become irresolvable medical ethical *dilemmas*. [One physician is quoted as asking,] ‘What does one do, then?’ . . . Discordant positions, irresolution, and an exhausted uncertainty seem the only conclusive products of three decades of discussion on medical ethics.”<sup>298</sup>

Emanuel later refers to “the claim that these problems remain irresolvable because of certain elements of liberal political philosophy . . . ,” and argues that “[t]he acute and interminable irresolution surrounding medical ethical questions in the United States arises not from advances in biomedical technology but from the tenets of liberal political philosophy.”<sup>299</sup>

It may well be that *some* ethical dilemmas are artifacts of particular politico-philosophic positions, but we are pretty well committed to some form of liberalism. Dilemmas do not necessarily disappear with the abandonment of liberalism. (Would the abandonment of liberalism, in whole or in part, thus be progress?) They may simply take different forms. For example, life also may be viewed as intrinsically valuable in totalitarian regimes, and natural and artificial organs are likely to be scarce there too. Particular conceptions of social worth, desert, and so on may vary from culture to culture, but this variance does not necessarily render them acceptable criteria for saving lives. Even a hierarchical, non-democratic society may place a high intrinsic value on human life, and thus also face a criterial selection problem in saving lives. Does the next artificial heart, assuming its use is legitimate within the group, go to the best Talmudist or to the poor tailor with ten children? To the security chief or the head of the armed forces? To Mother Theresa or the Pope or a small child? Just because a political culture is not liberal does not mean its selection criteria are limited to, say, estimates of future service to the State to the exclusion of everything else.

There are of course limiting cases in which cultural differences diverge immensely from our baseline. If our culture were assimilated into a Borg-like collective, whose members are not considered individual persons, lifesaving choices would seem to rest on whether one’s mechanical functioning within the collective is worth preserving given the resource costs. However, to say that a dilemma is the result of accepting personhood as a dominant moral category certainly does not diminish the dilemma’s force. *Of course*, many of our dilemmas would cease if we abandoned personhood, or decided human life was worthless, or believed that it was wrong to interfere with Fate or The Force in

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298. EMANUEL, *supra* note 123, at 5-6.

299. *Id.* at 33, 155.

trying to save lives. The problem is, we don't want to be assimilated with the Borg precisely because it does away with individuated personhood; we don't think life is worthless; and most don't think we sin by trying to forestall death with medical technology. Of course, at a high level of abstraction, we too, like the Borg, consider the advantages and disadvantages of any course of action, including lifesaving. For us, however, advantage and disadvantage are not solely matters of mechanical, financial, or resource-use efficiency. All cultures place some value on human life, even if it does not look that way from the outside or because the value is recognized only for members of the culture. Assuming we retain a moral ideal of personhood, think human life is valuable, and have no rigorous belief about the impropriety of human interference with Nature, decisions about whom to save or even whether to save will have to be made, and the learning impacts of these choices on community values will have to be considered.

*b. Catching up on "catching up": Is it progress to know that progress is impossible?; remarks on markets and decentralized choice.*—Despite its awkwardness, the call for law and ethics to catch up to technology is not meaningless. To the extent that the request is for unique right answers across the board, it reflects a major misunderstanding of ethics and law because it calls for the impossible. Yet the "ethics is falling behind" lament is made so often by so many that one is reluctant to say it just reflects a mass false belief in a Realm of Truth, or is just an expression of frustration over irresolvable dilemmas. Perhaps the frustration is compounded by anger at those who profess expertise but offer no solutions.

Can the catch-up call be reconstructed? How can one reconstruct, without demolishing, a request that presupposes an impossibility? Substantive difficulties of this sort often suggest use of decentralized, atomized procedures such as markets or lotteries. Why worry about how to select genetically influenced traits as a matter of centralized choice on the merits? Let people pursue their preferences (within limits) and an invisible hand will lead to some equilibrium.<sup>300</sup> (This maneuver of course does not instruct the atomized decisionmakers how to choose. If they ask that question from within the market, they still will have no answer.) Evaluation of the equilibrium can be left to moral and political philosophers, who need something to do to be kept from harm's way. Progress, lies in coming to understand that decisions at some cosmic macro level are not only unnecessary, they are ineffective. As far as substantive regulation is concerned, progress<sub>1</sub> consists of backing off from seeking the impossible. It is acquiring "meta-knowledge"—knowledge about whether it is even possible to acquire knowledge needed for answers to troubling questions, and if so how we acquire it. Progress<sub>2</sub> is getting the right answer.

There is much to be said for the recommendation to leave some matters to decentralized, atomistic decision making. The reflexive disdain for the marketplace often expressed by critics of using biological technology is not a

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300. See NOZICK, *supra* note 134, at 315 (referring to the possibility of a genetic "supermarket").

point in their favor and projects an image of ideological cement.<sup>301</sup> Unless there are important reasons pulling us the other way in certain areas, I take the liberal stance that a decentralized system of personal choice on most commercial and many non-commercial and in-between matters is the preferred default method for “solving” many complex social problems, such as who gets what. Some of these systems are markets or embrace market-like mechanisms.

Allergy to markets is understandable here because the most familiar and visible markets concern trade in *things*, tangible or intangible. All-or-nothing views about the taint of commerce are not well taken, however. In particular, category straddling, as with certain forms of what we might call “commerce in persons,” is not automatically immoral. Think of a professional sports team purchasing and trading athletes—more precisely, the exclusive rights to their services. More to the point, of course, is the intersection of family formation and commercial transactions, as in surrogacy, gamete sales, and even adoption. True, things that are not clearly one thing or another make us nervous: it is hard to describe, judge, and perhaps even use them. Many thus think that otherwise admirable or at least tolerable practices such as reproduction and sex are polluted by the intrusion of commerce. The response that this is not necessarily so, of course, does not commit one to holding that all category mixing reflects progress. But in some cases it may indeed be progress, or at least is not regress, and seeing this is itself a form of progress.<sup>302</sup>

Leaving things to market forces and decentralized choice generally is not a political non-decision. As many have said, even if markets were viewed as “natural” (they are in fact no more or less natural than many other systems of exchange and distribution), we know that we can alter natural processes and conditions, and not doing so represents a choice of sorts. Obviously, the consequences of our selection of economic regime and of the choices made by the individuals within them may escalate sharply as technology expands our range of options. The expansion of opportunities may enhance autonomy and general well being in many respects, but it also may be ruinous in others.

Recall that discussion of decentralized choice mechanisms came up because of our encounter with supposedly failed substantive rationality, and our resulting insight that clearly correct answers to hard problems are often impossible. How valuable is it to realize this? If we have more meta-knowledge and a clearer idea of our limitations, so what? This insight is about as fulfilling as “Do the right thing” or “Keep on truckin’.” As “progress,” is it worth even a nickel?

Whatever its worth, it may be all we can aspire to when confronting values and concepts that conflict both among and within themselves. No amount of research or reflection on our deepest problems is likely to serve up a stunning

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301. See George Annas, *Human Cloning: A Choice or an Echo*, 23 DAYTON L. REV. 247, 250 (1998) (criticizing “choice for the sake of choice” and the noisome effects of markets).

302. See generally Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 HEALTH POL., POL’Y & L. 57, 76 (1989) (discussing the inflexibility of normative categories, but noting that they may change over time; referring to changes in views about assessments of artificial insemination; and commenting on the possibility of markets for organs).

illumination that inspires the cry, "How come we didn't see that before?" We may, however, by reflection and careful application and refinement of our tools of thought, reduce the time between seeing a problem and responding to *it in some way*; we may increase our sense of having attained a comfortable, if somewhat regret-filled equipoise, even though it does not reflect some timeless right answer; and, in implementing our choice, we may behave in ways that will reinforce valued attitudes and beliefs. This will not magically resolve tensions between liberty and equality, or within contending versions of equality and autonomy, but it can ease the way for the sorts of working compromises and clumsy institutions<sup>303</sup> that we make as we bungle along. I do not see this as an empty call for dialogue or conversation. People can meet and dither, but they still must grapple with what they *ought* to talk about, how to construct their agendas, what substantive principles to apply to the problems at hand, and what procedures to install to further the process and/or keep the peace.

Sometimes the result constitutes a sort of progress<sub>1</sub>. The volumes produced by the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research in (1982) are one example. On the other hand, the 1997 Report and Recommendations of the National Bioethics Advisory Commission on cloning seems to me to be a counterexample.

If we cannot in principle attain definitive answers whenever we like, and we are simply told to discuss and deliberate, how do we proceed? When Professor Roger Dworkin states that "our [legal-institutional] tools for dealing with social problems posed by rapid change in biology and medicine are limited at best,"<sup>304</sup> he is correct. They cannot be improved to the extent that the right answers are identified across the board. However, the substantive content of these legal-institutional tools, along with connected tools of moral/political/policy analysis, are all that we have to work with in finding answers or determining whether we should rely on a decentralized choice mechanism or other form of "black box." To the extent that we do find answers, however, the mechanisms of formal and informal legal processes may be important features of decision making and of reinforcement of preferred norms. Some issues and problems *can* be resolved well enough by substantive principle.

As for gains in our moral behavior ("progress,<sub>3</sub>"), there is no *a priori* reason why it cannot improve with respect to forms of moral conduct that most reasonable persons in most cultures can agree on. Such improvement, at any rate, does not violate any laws of nature, and may significantly alter the bioethics terrain. In another article,<sup>305</sup> for example, I suggest that the chief sources of harm from human cloning—to clones and to everyone else—arise from a self-fulfilling prophecy: we will treat many of the cloned offspring in ways that will help assure that they are harmed, not by their existence as such, but by the avoidable conduct of their custodial parents and various external observers and busybodies among the general public. If we learned not to ill-treat others having different

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303. See Wong, *supra* note 289. See generally Shapiro, *supra* note 205. .

304. DWORKIN, *supra* note 187, at 18.

305. See Shapiro, *supra* note 62.

origins, then the prospect of human cloning would be less intimidating. That is progress;<sup>3</sup> actual improvement in human behavior where we have concluded that we know what proper behavior is.

As for definitely settling acute moral conflicts and anomalies, this is no more possible than it is to identify the limits of infinity. That's the way the world is. We can strive to get straight the core of our confusion—this is clarification as progress—but here we need to be reminded of yet another paradox. The very project of clarification can be called in question, for at least two major reasons. One is the occasional need to keep some things hidden from ourselves; the other is the widespread hostility to reflection noted earlier. The critique of clarification reflects a confused belief that the truth is out there and all we need is common sense to see it.

4. *Terminating Technology; Technological Imperatives Again.*—One might recommend terminating technological progress along several fronts where the expected harms are thought to exceed the expected benefits. The cessation of technological progress in such circumstances would thus constitute true progress overall. It is hard to see how this can be done, however, without terminating or neutralizing all persons with intact cortices. We could instead try to delay the onset or implementation of various technologies. (Recall the moratoria on human cloning.)

Such delays are not impossible, despite what some call the “technological imperative.” One of the underlying assumptions of the catch-up call is that this imperative is in continuous operation. The idea is that technologies are irresistible to us: we are driven to acquire the knowledge to develop them, and once they are here or within sight, we are impelled to use or develop them. These irresistible urges are strongly reinforced by the escalating need to recover our prior financial and emotional investments in the technologies, by our anticipation of the sheer fun and general utility in using them, and by the general influence of the ideal of progress. No doubt there are other complex emotional factors that account for technology’s perceived status as a Great Attractor, inexorably pulling us to embrace it so it can embrace and, as some think, consume us.

Such imperatives, then, are sets of incentives to develop and apply technologies. The pressures installed by these incentives derive from expectations and from preferences arising out of prior investments—pressures that may raise the probability that a technology will in fact be used.<sup>306</sup> This is the only plausible interpretation of the claim that “‘can’ implies ‘ought.’”

Unearthing the true nature of technological imperatives is only a weak form of progress,<sup>2</sup> because of the high level of generality involved. It is not useless, however, because it argues against an automatic bar on scientific research.

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306. See Shapiro, *supra* note 47, at 1100-01 (describing the pressures upon childless couples to use the new reproductive technologies in order to have children).

#### IV. A REVERSAL: WHEN SCIENCE AND TECHNOLOGY CATCH UP WITH HUMAN THOUGHT—IMPLEMENTING THE IDEA OF PROGRESS

##### A. In General

This inversion of the symposium theme suggests some instructive points about it. There is one obvious sense in which science and technology may catch up with human thought: the arrival of new capabilities after we have first imagined them. Indeed, one might say that most scientific and engineering progress, pure serendipities aside, involve catching up to one's advance vision. People formulate hypotheses and test them. Science and invention do not thrive solely on the amorphous idea that things aren't so great. They require that we grasp the notion that things can improve. That notion necessarily requires imagination—a perception, however inchoate—of how we and the world might change to our benefit by acquiring knowledge and acting on it.

Catching up with one's vision is thus an intrinsic aspect of an ethic of progress in any domain. One must picture an ideal, however hazily, and think that it is possible to approach or attain it. Sometimes it is perceived need that drives vision, although such needs may themselves be generated by prior scientific developments: one sense of technological imperative is suggested by the reverse aphorism, "invention is the mother of necessity."<sup>307</sup> Deliberate progress presupposes an idea of something not yet accomplished that might and should be.

What would be an example of science and technologically catching with our advance vision? Think of a basic presupposition underlying scientific research and application: the causal principle. I reduce this complex idea by saying that it is a scientific/philosophical postulate that the universe is orderly because its processes and happenings are causally related and these relations can be discovered.

The causal principle, expressed in assorted forms, has long engaged philosophers, scientists, and law-persons in trying to reconcile it with ideas of human freedom and responsibility. It seems endlessly troublesome to be coherent about freedom and responsibility if we believe in the locked-in workings of reality. Until recently, however, we knew little or nothing about the specific pathways of the causal principle in life processes. Despite some cognitive dissonance (at least among scientists, legislators, judges, and of course philosophers), we have all gone about our business, including the business of assigning responsibility, relatively untroubled by these reconciliation problems. We imagined a universe of causation, but had little idea of how it operated. Things are different now.

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307. ARTHUR KORNBERG, THE GOLDEN HELIX: INSIDE BIOTECH VENTURES 8 (1995) ("It was generally agreed that the age-old saying 'necessity is the mother of invention' is usually wrong. Generally, the reverse has proved to be true: *invention is the mother of necessity*. Inventions only later become necessities.").

### B. Neuroscience, Genetics, Ethics, and Law<sup>308</sup>

The philosophical project of accommodating free will and determinism is maddening, although in this respect it differs only in degree from other philosophical subjects. There are major disputes about how even to describe the project. On some views, there is nothing to be accommodated because there aren't two things at war: causality is not only compatible with freedom, it is required by it. In any case, we all sense that our decisions are generally our authentic decisions, arrived at freely, and that in most cases we could have altered the course of our lives by deciding differently. Therefore, our wills are perceived to be free.

This self-perceived freedom is the determinism debate's analogue to the well-known naïve refutation of philosophical idealism: one kicks the stone, senses the pressure, feels the pain, and concludes that the world is real and physical because an idea can't mash your toes. A latter-day Samuel Johnson might, in parallel, exercise his will to snap his finger, see that it snaps, and conclude that his will is free.

Notions of compatibilism or of viewing freedom solely as a subjective perception have not resolved the issues, at least not for all who think about them. Many remain skeptical about whether the idea that one could have done otherwise can endure alongside the principle of causality. In reality, some think, we are no freer than machines and mindless or unreflective forms of life. The conscious sense of freedom is just an adaptive delusion.

Such views may have quite an impact on our notions of moral agency and responsibility, desert, merit, character and virtue. The difficulties in making sense of them in a causal world may seem overwhelming, when we bother to think about them. Much of the time, of course, we don't think about it because we don't have to. It is important only to the obsessive workings of some academic minds. When pressed, some will say that we operate the criminal justice system and much of everyday morality on a useful pretense. We proceed *as if* we were free. Others may insist, however, that we need not proceed as if we are free, because we really are free. Being free simply means freedom from certain external and possibly internal constraints, not from the orderly workings of the universe. Unfreedom occurs only when there is a significant departure from this normal causality baseline, and freedom and causality are thus compatible. (Indeed, how could we be free if our actions were *not* fully caused?)

We are, of course, reminded of the debate whenever criminal defendants mount an insanity or other defense based on mental disorder. Still, it has been relatively easy to avoid internal reservations about the causal principle and continue to operate moral and penal systems founded on notions of personal responsibility for actions taken freely.

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308. See Michael H. Shapiro, *Law, Culpability, and the Neural Sciences*, in THE NEUROTRANSMITTER REVOLUTION: SEROTONIN, SOCIAL BEHAVIOR AND THE LAW 179 (R. Masters & M. McGuire eds., 1994) (describing advances in neuroscience and arguing that they do require abandoning ideas of freedom and responsibility).

Within the last few years, however, neuroscientific work has suggested *not* simply that the causal principle holds for thought and behavior, which we already believed but that we can begin to identify some of the specific neurophysiological mechanisms underlying them. Several related discourses now describe these causal networks in great, if very incomplete, detail, some relying on the language of chemistry, others on genetic pathways, and still others uniting both or offering still more discourses.

For example, studies that correlate impulsive misconduct or explosive anger with the neurochemistry of serotonin suggest that the likelihood of misbehavior goes up with the lesser availability of serotonin as a mediator of electrical activity in the brain. Because neurotransmitter chemistry is significantly affected by genetic factors, neuroscience research in combination with accelerating knowledge of the human genome may greatly enhance our ability to assay, predict and control the course of mental/behavioral pathologies. It is still too early to definitively evaluate the serotonin studies, but they have revived talk of neurophysiological screening and treatment of some sort for those with what might come to be called "serotonin deficiency."<sup>309</sup> Indeed, a conference on the biological/genetic roots of violence was partly inspired by these findings, although it was aborted because of the objections of those who thought the project racist.<sup>310</sup>

Of course, this account is still very general. We are nowhere near specifying the Book of Life. However, the increasingly finer-textured accounts of the causes of behavior have invigorated the determinism/free will debate. The causal pathways, or the possibility of learning more and more about them, are now striking. It is harder to ignore them.

From the viewpoint of ethical theory concerning freedom and determination, however, nothing has changed except the details. We have moved from saying, "All this has got to be caused by determinable factors subject to scientific discovery, although we are presently clueless about the nature of these factors," to saying, "It is quite possible that the occurrence of certain kinds of behavior has a lot to do with identifiable and controllable features of brain chemistry and structure, specifically, with . . . ."

Such increased knowledge brings at least the theoretical possibility of

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309. See generally J. Philippe Rushton, *The Neurotransmitter Revolution: Serotonin, Social Behavior and the Law*, 14 POLS. & THE LIFE SCI. 117 (1995) (discussing genetic prescreening for low serotonin); Gabrielle Strobel, *Pugnacious Mice Lack Serotonin Receptor*, 144 SCIENCE NEWS 367 (1993). Note, however, that the correlations between conduct and serotonin chemistry are not simple. "As [certain researchers] have shown . . . the combination of alcoholism, low serotonergic function, and a third biochemical condition, low glucose uptake, are highly predictive of impulsive violence or arson." Roger D. Masters, *Environmental Pollution and Crime*, 22 VT. L. REV. 359 (1997).

310. See Eliot Marshall, *NIH Told to Reconsider Crime Meeting*, 262 SCI. 23 (1993). A conference on heredity and violence was eventually held, although it was disrupted. See Natalie Angier, *At Conference on Links of Violence to Heredity, a Calm After the Storm*, N.Y. TIMES, Sept. 26, 1995, at C8.

sharply increased control over thought and behavior. We can screen large populations for anomalies in their serotonin chemistry, or in the size, shape or structure of this or that part of their brains.<sup>311</sup> We can place this information in huge databases. We can in principle engineer drugs and surgical procedures to avert, encourage and shape thought and conduct. And why shouldn't we? We are merely replacing our insufficiently precise current forms of biological control over behavior with more finely calibrated tools.

So, biological science has caught up with human thought in this sense. The axiom-like causal principle of science and philosophy, when applied to complex life processes, has historically been a broad working formula serving as a vague foundation for science and technology. Now, however, we are filling in the huge blanks, replacing the vagueness of the causal principle with the specificity of neurotransmitter pumps and pathways, and devising medicines to regulate the pumps or to block or open chemical pathways or pave new ones. The causal principle now confronts us with an increasingly detailed blueprint, and it is hard to ignore.

There is no new fundamental abstract insight here, however. That intuitive flash occurred a long time ago. It is the newly discovered particulars that make the fundamental insight vivid and compelling, reviving the freedom/determinism debates. We are not conceptually or morally obliged to abandon any notions of freedom or unfreedom we held before, but our attention has been caught and the problem is before us. It is one thing to say everything is caused. It is quite another to say that your assault on an aggressive entrepreneur demanding to clean your windshield for free was in significant part caused by a relatively low serotonin availability in your brain. The apparent incoherence of our clumsy institutions of moral and legal responsibility are now, if not at the forefront of our minds, far more visible.

In this sense, then, science and technology have gained on an enduring body of moral and legal analysis resting on long-held philosophical and scientific postulates, and are threatening to move past our moral and legal thinking, returning us to our original catch-up problem.

For bioethicists and lawyers, then, serious problems are raised both by the symposium's question whether science is outrunning law and ethics, and its inverse question whether human thought in formulating scientific projections and philosophical/moral problems is outrunning science. But when science makes gains on human imagination and begins to outrun it, we are returned to the symposium theme-in-chief. When technology's advances finally match or exceed our scientific/technological imaginations, our moral and legal systems for determining responsibility are again urged to make progress.

Now we are back to where we were. Assume that some practical technological mastery is attained in predicting individual human conduct far

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311. Cf. Richard Stone, *HHS 'Violence Initiative' Caught in a Crossfire*, 258 Sci. 212 (1992) (describing one research proposal: "[T]he researchers will provide 'intervention' for the children in the form of parent training, tutoring, and social skills training. The children will be followed through high school.").

more precisely than ever, and in intervening into specific mental processes so as to forestall misconduct, encourage sound conduct, enhance intellectual abilities, and so on. At this point, the power of ethical and political theory to help us seems to run out. We have never solved to everyone's satisfaction the paradoxes of human freedom. We cannot be free if our conduct is caused, and we cannot be free if it is not, or so the puzzle goes. Some will be strongly inclined to conclude, though they are not conceptually bound to, that only the therapeutic state makes sense. Despite its apparent support in various quarters, however, the therapeutic state is hard to fit into our constitutional system. Apparently, we cannot live as we prefer without a posit of responsibility and desert based on a notion of free decision making. And we cannot live with it because it appears to be false.

Once again, our systems of moral and legal thought cannot fully relieve our misery in facing the possibilities of biological technology, and it makes no sense to expect otherwise. The moral and conceptual reality is that there are conflicts, paradoxes, and indeterminacies that we cannot settle decisively by resort to principle, though we will act pragmatically, if clumsily, to work around our difficulties through political and policy compromises.

Why should we continue our moral and legal deliberations if catching up to technology is impossible? Because not everything is hopelessly indeterminate and progress of a sort is possible. Learning the structure of what ails our present deliberations may aid our future deliberations and assist us in constructing institutions that try to accommodate conflicting attitudes, values and beliefs.

#### CONCLUSION: BIOETHICS DEFENDED AGAINST THE CHARGE THAT IT IS PRESENTLY INADEQUATE TO THE TASK OF APPRAISING BIOLOGICAL TECHNOLOGY

Bioethics is getting a lot of heat and in most respects does not deserve it, at least insofar as its threshold recognition of moral and legal issues and its use of normative/conceptual tools are concerned. If the discipline of bioethics persistently yields results or recommendations at war with your own views, it does not follow that the foundations of the discipline are infirm, whether as a matter of substance or procedure. Bioethics could of course criticize its critics on such bottom-line grounds, but this is no more appropriate for bioethics than it is for anti-bioethics.

Alternatively, if bottom-line disagreement does not authorize an inference that a discipline is operating without a cortex, what criteria would justify saying that the discipline is infirm? We would so characterize it if its practitioners systematically misstate facts, directly or by suppressing context; rely on invalid or unsound arguments; select immaterial abstractions or overrate their importance; ignore material abstractions or underrate their importance; misapply the abstractions by ignoring or undergrading relevant criteria of interpretation or selecting or overgrading them; or make pronouncements or offer arguments when working under an undisclosed conflict of interest.

These criteria for intellectual infirmity, however, rest on certain critical ideas, such as moral materiality. There is no shortage of disagreement on what

indeed is morally material. Do courts or commentators ignore or understate the interests of gestational mothers when they defer to the parties' original intentions to lodge custody with the genetic parents. There is no easy answer to this, despite some contrary claims.<sup>312</sup> Perhaps the right to custodial motherhood is too important to be left to contract, and should instead rest on status. Which status—that of being the ovum source or of being the gestator? I say that *Johnson v. Calvert*<sup>313</sup> was correct in ruling that where a prior custodial agreement is in evidence, we can leave status aside and address the parties' original expressed understandings.<sup>314</sup> Critics wrongly think that the decision "ignored" the interests of gestational mothers. To say that an interest lost in a given case does not mean it was "ignored" or even downgraded by anyone. Nor does it mean that the decisionmaker failed to recognize the significant effects of gestation on the developing fetus and thus the child ultimately born.<sup>315</sup>

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312. See Rothman, *supra* note 37, at 1607 (rejecting "the notion that any woman is the mother of a child that is not her own, regardless of the source of the egg and or the sperm").

313. 851 P.2d 776 (Cal. 1993).

314. See *id.* at 781.

315. There is no reason to suppose that the impact of gestation was unknown. See generally R. Brian Oxman, *Maternal-Fetal Relationships and Nongenetic Surrogates*, 33 JURIMETRICS J. 387 (1993). The author recommends that the custody decision in gestational surrogacy rests on the child's best interests, and states that

[a] child born to a gestational mother who has not contributed genetic material to the zygote has two mothers, a gestational mother and a genetic mother. . . . The gestational mother's endocrine connection and role in the formation, development, and physiological functioning of the fetus are unique in every instance and create a biological mother-child relationship. . . . There is no organ system of the resulting fetus that is not anatomically, physiologically, and genetically affected by the maternal endocrine system to the extent that the resulting fetus is a unique product of the gestational mother that gives rise to a lifelong maternal-child relationship. This relationship must be taken into consideration in any legal proceeding where the physical and legal custody of a surrogate-produced child is at issue. The surrogate mother is a creator of the child sharing an equal role with the genetic mother, and the surrogate's right to a relationship with the child she has created must receive legal recognition. [¶] Because the gestational mother's contribution to the genetically unrelated child is so significant, the appropriate disposition of custody disputes requires the best interests of the child to be assessed . . . ."

*Id.* at 424 (footnote omitted).

The idea of an "equal role" is clearly normatively ambiguous. It is one thing to describe physiological impacts, but quite another to evaluate them for purposes of determining comparative effects. Before, being a biological mother was a matter of empirical fact—sex, pregnancy, and birth—although impaired observation might create evidentiary difficulties. Artificial insemination and IVF were not thought to compromise biological motherhood, and this was probably not even perceived as a value issue. Gestational surrogacy, however, makes it impossible to rest on empirical observation as decisive. If the gestational mother has X impacts on the child and the genetic mother's genome has Y impacts, nothing follows, without further premises, about who the natural

In *Johnson*, gestation's value was outweighed by another consideration—the intentions of autonomous parties concerning their reproductive interests. Perhaps *Johnson*'s critics have misapprehended the nature and value of genetics and of the overarching value of reproductive autonomy—although this too would not follow simply from the fact that they think *Johnson* was wrongly decided. In any event, if the root of the objection to a viewpoint, decision, or discipline is a raw moral disagreement rather than a clear flaw on one or both sides, it may be misleading and time-wasting to complain about the fatal deficiencies in the opposition's thinking.

Sometimes an entire field or some substantial part of it may have taken the wrong path, or at least failed to take the best one. It took a while for the germ theory of disease to be accepted in medicine and science. Here, "path" must be described at a fairly high level of abstraction. Simply reaching conclusions at war with your own does not mean your opponents have taken the wrong fork at some fundamental point. Of course, if there is disagreement, then at *some* stage the partisans have taken different roads. This, hardly establishes that either of their argument structures is deeply flawed.

In any event, it is no failing of ethical theory, law, or bioethics that they do not always give us answers that a group of skilled commentators, courts, legislatures, and an informed citizenry could agree on with near-unanimity as definitive. Here, an admonition of Heidegger is to the point: sometimes we notice things only when they fail.<sup>316</sup> Perhaps bioethics fails when faced with the moral and legal anomalies created by our division and recombination of biologically integrated life processes. But every discipline and approach may fail under such circumstances. In some arenas, answers *are* often provided, at varying levels of generality and specificity. Many agree that we have identified the primary criteria for withdrawal or withholding of medical care where the likely consequence of doing so is the patient's death; that there is nothing inherently wrong with organ transplantation; that the idea of brain death is needed, despite the technical and philosophical disputes still swirling about it; that informed consent by patients or their proxies, or possibly by families as an autonomous unit, is a necessary (though not sufficient) condition for various forms of medical intervention; and, answers or no, that we have identified many of the critical variables necessary to evaluate the technological alteration of living persons or of possible persons via the germ line.

In various situations, however, not only is there no clear consensus, it is impossible to specify what such a consensus could rationally be based on even

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mother is, or about whether there are really two of them. Of course, it is a vast factual oversimplification to put the question this way, but the conceptual point is clear. How would we rate a large effect on kidney development as against liver, heart, or brain development? If we were assessing brain development impacts, would cognitive or emotional impacts count for more, or does it make any sense to calibrate so finely? If it does not, what is the point of the physiological comparison in the first place?

316. See generally MARTIN HEIDEGGER, BEING AND TIME 102-03 (John Macquarrie & Edward Robinson trans., 1962).

if we arrived at it. We cannot resolve the paradox of lotteries: on one view, respect for persons requires individuation when distributing important but scarce resources, especially lifesaving procedures; on the rival view, respect for persons forbids such individuation and rationally calls for its opposite—total fungibility within the class of potential recipients. Of course, we will either have lotteries or we will not, but the decision will turn not on the solution to the lottery paradox, but on many other factors, including our sense of the impact of institutionalized lotteries on our preferred attitudes and values. Even if we achieved consensus, we could not infer that we had found the true right answer. (If we did, would the state or society be permitted or obliged to recognize and enforce the right answer?<sup>317</sup>)

What *is* possible is knowing more clearly the nature of the blockades to moral closure in some areas, and seeing its possibility in others. Knowing that something is impossible may not sound like much, but we sometimes do pay experts to tell us whether we can or cannot do what we wish to. Furthermore, this knowledge may have spillover effects in helping bring closure for issues capable of it and help us design institutions, perhaps awkward, unwieldy edifices, that effectively allow us to get on with things. In any event, learning the nature of the difficulties preventing progress is itself progress. If we cannot get more than that, then the question becomes whether we should or can delude ourselves otherwise.

I have said that most criticisms of bioethics seem off the mark and too result-oriented. Resting our critiques of moral and legal analysis largely on outcomes does not provide adequate guidance in assessing either the cases at hand or future disputes. This is fatal to a coherent ethics and a coherent legal system, at least as we have come to understand these ideas. The critiques of bioethics are often far more plausibly called “flawed” than bioethics itself because of their fixation on conclusions. As a moral and methodological critique, this is too insubstantial to be of service. Not only is there nothing wrong at the threshold in working with paradigms, principles, and other abstractions, one cannot proceed or even start without them, and the critique of particular paradigms in bioethics is unpersuasive.

In general, the talk about law and ethics being behind science and technology has to be reconstructed to make sense. Law and ethics are categorically different from science and technology and from each other, despite isomorphisms in argument structure and the “fuzziness” of the fact/value distinction. They *concern* science and technology, they are *about* science and technology (and everything else), but they are a different order of existence, and it is thus impossible to apply the same sense of progress to both domains. Their canons of verification differ strongly, despite the structural similarities. There is no race between law and ethics on the one hand, and science and technology on the other.

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317. See generally WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 206-07 (1990); Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685 (1992); Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350, 1356 (1991).

In many instances, indecision, paradox, and indeterminacy are not usefully considered flaws in law or in ethics because they are inherent in them. One is not deficient for failing to come up with a certainly correct answer when it is impossible to find one.

Progress in the connected worlds of law and ethics can be assayed by inspecting both the large and the fine structures of our thinking. For one thing, thinking about how we think can help yield answers where answers are possible. Many observers initially had major reservations about the very propriety of, say, withholding artificial nutrition and hydration, or of transplanting organs, or of allowing persons to refuse lifesaving or life-prolonging treatment. Some still do, but the degree of consensus that these procedures may be pursued in many situations is quite high. One encounters opposition within relatively discrete groups defined by certain moral and/or religious views, but not global rejection.

One can expect progress in seeing and addressing some issues that are strongly contested at particular levels of specificity. For example, people who agree on the desirability of organ transplantation may part company on whether queues for organs should be set up for local, regional, or national constituencies. Seeing the issue of constituencies came early, but its perceived importance has grown because of the interaction of technological change and debate. Thus, extension of organ preservation times strengthens (but does not prove) the case for a national constituency and, more generally, makes the constituency issue more vivid. Immunosuppression technology favorably affects the case for transplantation even where tissue matches are nonoptimal. It also alters supply and demand forces, perhaps intensifying distributional issues generally. Such subtechnologies stimulate recognition of new perspectives or the relative importance of old perspectives, and new normative insights become likelier.<sup>318</sup> The facilitator for such insights is continued rational debate, not simply conversation without criteria. Perhaps we did not follow the precedent for kidney disease—government funding for medically indicated treatment—in managing other specific disease categories because we came to understand that such allocations were themselves death decisions.

Even where no satisfactory answers are conceptually possible, we may still develop a rough, perhaps temporary, consensus. Very few persons would opt for

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318. See Nagel, *supra* note 11, at 211 (stating that “characteristic of the modern Kantian tradition, moral thought involves the development of more complex, morally influenced motives, as our sense of what is and is not a sufficient reason for action is altered by changing conceptions of equity, fairness, responsibility, cruelty, desert, and so forth.”).

But cf. Holmes, *supra* note 15, at 157 (arguing that “philosophical ethics” has “[s]ome . . . but not much” relevance to solving bioethical problems; noting that it promotes “conceptual clarity” and “can provide the categories by which to discuss the problems theoretically,” and in some cases it can show that acceptance of a given moral position may allow inferences within “substantive morality”). The author insists, however, that philosophical ethics is neither necessary nor sufficient for resolving the problems at hand. See *id.* I assign more importance to moral and legal clarification, where it assists in achieving personal moral closure, if not without regret, and in allowing parties in disagreement to reach a decision.

a lottery to distribute validated lifesaving resources such as a fully implantable artificial heart, despite their unhappiness with any conceivable set of substantive criteria for differentiating persons. They are unlikely to change their minds even after exposure to the lottery paradox. Perhaps understanding the structure of the paradox may help them see why they are opposed to lotteries, and/or make them more comfortable with their discomfort. Perhaps understanding the paradox will lead them to inquire into empirical questions such as how we are likely to react to shifting from the search for substantive criteria to their rejection in favor of randomness. Perhaps the consensus will change if some moral and religious views change.

Finally, and of considerable practical importance, moral reflection in some cases may highlight aspects of a situation, leading particular decisionmakers to their own informed resolution. Enabling these personal decisions may be a form of moral progress even when it cannot yield definitive answers within normative or metaethical theory. Moreover, even if a wrong decision is taken to engage habitually in good faith moral reflection is a virtue apart from the outcome.<sup>319</sup>

I am not even remotely suggesting that progress is simply a function of process. The temptation to forego substance because of its uncertainties in favor of choosing fair procedures is understandable, and in various situations resort to procedural solutions may be the only available pragmatic strategy for securing an acceptable a bottom-line decision. However, there can be no assurance that the process will culminate in a morally convincing answer or a situation that all would say is the best of the alternatives. Indeed, conscientious decisionmakers who find themselves planted within some procedural scheme, say, a committee to distribute scarce medical resources, will experience precisely the same difficulties encountered by those who, not knowing how to generate a right answer, established the procedure in the first place. What would be clearly amiss, then, is to assert that because we cannot resolve a matter definitively, something is wrong with moral and legal theory generally and bioethics in particular. There are many who cannot abide such uncertainty and the shortage of answers it entails. The only sensible response is: get used to it, because there is no honest alternative.

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319. Cf. Holmes, *supra* note 15, at 157 (stating that “[t]he cultivation of a morally sensitive, caring, and compassionate character probably counts for more in the end than analytical skills.”). Emphasis on moral virtue and virtuous acts and on moral character generally is an important topic in all branches of ethical theory, but I do not think it can displace to any significant degree the received forms of normative, metaethical and applied ethical theory. The idea of virtue is not independent of basic questions of rightness and goodness. See generally BEAUCHAMP & CHILDRESS, *supra* note 273, at 62-69.

# THE MISPERCEPTION THAT BIOETHICS AND THE LAW LAG BEHIND ADVANCES IN BIOTECHNOLOGY: A RESPONSE TO MICHAEL H. SHAPIRO

DAVID ORENTLICHER\*

## INTRODUCTION

In his article in this symposium, Professor Michael Shapiro responds very well to the critiques of bioethics.<sup>1</sup> As he observes, standard critiques of the field are misguided or misinformed. Critics either are incorrect in their observations, or they demand more of bioethics than is reasonable.<sup>2</sup> According to some writers, for example, it is nice that bioethicists can elucidate valid considerations on both sides of a particular debate,<sup>3</sup> but society also needs to know, in the end, what kind of action to take. Professor Shapiro is right in saying that we cannot condemn bioethics simply because it often does not generate clear answers. To the extent that we can fault bioethics for its indeterminacy, we can also fault other academic disciplines like economics, sociology and political science. Moreover, as Professor Shapiro points out, there is an important kind of expertise in improving the quality of our moral reasoning; bioethicists do very much contribute when they indicate how one might legitimately analyze a bioethical dilemma.

Because I generally agree with what Professor Shapiro has written, I will respond to his article by adding to it, rather than detracting from it. But, I should acknowledge that, as someone who characterizes himself as a bioethicist, it is in my self-interest to agree that bioethics is not broken and that bioethical thought is unfairly viewed as lagging behind developments in science and technology.

In making my comments, I want to accomplish two things. First, I will reinforce Professor Shapiro's defense of bioethics by providing some evidence that bioethical thought anticipates developments in science and technology more than it lags behind them. Or, as Professor Shapiro suggests, it may be more accurate to talk about science and technology catching up with bioethical thought, rather than about bioethics catching up with science and technology.<sup>4</sup> Second, I will offer some speculation about *why* the view persists that bioethics lags behind developments in science and technology despite convincing arguments to the contrary.

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1. See Michael H. Shapiro, *Is Bioethics Broke? On the Idea of Ethics and Law “Catching Up” with Technology*, 33 IND. L. REV. 17 (1999).

2. See *id.* at 24-26.

3. Or, as Professor Shapiro observes, bioethicists are quite good at talking the “on one hand . . . on the other hand” talk. See *id.* at 30.

4. See *id.*

As a preliminary matter, I begin with a definition of terms. Professor Shapiro quite correctly observes, we can conceive of bioethics lagging behind science and technology in different ways.<sup>5</sup> I will discuss the lagging charge in terms of the idea that we see science and technology come up with important new developments with which our ethical thought is unprepared to deal. That is, according to this version of the critique of bioethics, we learn to do new things before we know whether it is a good idea to do them.

I will now turn to the first part of my article—evidence that in fact bioethical thought anticipates developments in science and technology more than it lags behind those developments.

### I. EVIDENCE THAT BIOETHICS ANTICIPATES DEVELOPMENTS IN SCIENCE AND TECHNOLOGY

In recent years, we have had no shortage of important developments in medicine that raise ethical dilemmas. As these developments occur, it is all too common to hear people say that bioethics is lagging behind, that we are not morally prepared for the dilemmas. Yet, if one looks more closely, it turns out that bioethical thought has, in fact, anticipated developments in science and technology.

For example, consider what some might view as the most stunning development in medical technology in recent years, the announcement in 1997 that Scottish scientists had cloned a sheep, "Dolly."<sup>6</sup> The announcement provoked a flurry of hand wringing and other expressions of concern, and newspapers and magazines were filled with commentary.<sup>7</sup> Had bioethicists not adequately considered the ethical implications of cloning, as many suggested? It turns out that a major academic debate on the morality of cloning was sparked in 1966 by Joshua Lederberg, a Nobel Prize-winning geneticist.<sup>8</sup> Lederberg thought cloning would be a good idea,<sup>9</sup> and the debate was quickly joined by two

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5. See *id.*

6. See Ian Wilmut et al., *Viable Offspring Derived from Fetal and Adult Mammalian Cells*, 385 NATURE 810, 810 (1997).

7. See, e.g., Sharon Begley, *Little Lamb, Who Made Thee?*, NEWSWEEK, Mar. 10, 1997 at 52; Gina Kolata, *Scientist Reports First Cloning Ever of Adult Mammal*, N.Y. TIMES, Feb. 23, 1997, at 1; Charles Krauthammer, *A Special Report on Cloning*, TIME, Mar. 10, 1997, at 60; Thomas H. Maugh II, *Scientists Report Cloning Adult Mammal*, L.A. TIMES, Feb. 23, 1997, at A1; *Scientists Succeed in Cloning a Sheep; Genes Transplanted, Then Hello, 'Dolly,'* ST. LOUIS POST-DISPATCH, Feb. 24, 1997, at A1; David Stipp, *Gene Chip Breakthrough Microprocessors Have Reshaped Our Economy, Spawns Vast Fortunes, and Changed the Way We Live; Gene Chips Could Even Be Bigger*, FORTUNE, Mar. 31, 1997, at 56, 56.

8. Lederberg shared the Nobel Prize in medicine-physiology in 1958. See THE WORLD ALMANAC AND BOOK OF FACTS 1999 at 667 (Robert Famighetti ed., 1998).

9. See Joshua Lederberg, *Experimental Genetics and Human Evolution*, 100 AM. NATURALIST 519 (1966) [hereinafter Lederberg, AM. NATURALIST]; Joshua Lederberg, *Experimental Genetics and Human Evolution*, 22(8) BULL. ATOMIC SCIENTISTS at 4 (1966)

prominent ethicists of that generation, Paul Ramsey and Joseph Fletcher,<sup>10</sup> as well as other moral philosophers and ethicists over the ensuing decade.<sup>11</sup>

If one looks at the commentary about cloning between the late 1960s and late 1970s, one sees the same "staking out" of sides that has occurred in the past couple of years. Like many contemporary critics of cloning, Paul Ramsey worried about (1) the unknown medical risks to children born of cloning,<sup>12</sup> (2) the threat to personal identity of children born with very specific expectations as to how they should turn out,<sup>13</sup> and (3) the threat to parenting if people started viewing children as products to be artificially designed rather than persons to be naturally conceived.<sup>14</sup> Other commentators invoked (4) the interest or even the right of people to not be deprived of their unique genetic identity<sup>15</sup> and (5) concerns about the psychological effects on children of cloning from not having a biological father and mother in the way everyone else does.<sup>16</sup> As to the concern that cloning could be abused by authoritarian regimes or mad scientists, one can go back to 1976 and the *Boys of Brazil* by Ira Levin,<sup>17</sup> or at least as far back as 1932 and Aldous Huxley's *Brave New World*,<sup>18</sup> for such an argument.

Arguments in favor of cloning are also not new. Long before Dolly was cloned, we also had already seen (1) emphasis on the importance of procreative autonomy,<sup>19</sup> (2) observations that concerns about psychological harm from cloning are exaggerated and fail to take adequate account of non-genetic sources of personality,<sup>20</sup> and (3) claims for important benefits that might be gained from cloning. For example, writers have noted the ability of parents to avoid passing a genetic disease to their offspring,<sup>21</sup> or the ability of infertile couples to have genetically related offspring rather than children from a mix of their own genes

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[hereinafter Lederberg, BULL. ATOMIC SCIENTIST].

10. See Allen D. Verhey, *Cloning: Revisiting an Old Debate*, 4 KENNEDY INST. ETHICS J. 227, 227 (1994).

11. See Craig M. Klugman & Thomas H. Murray, *Cloning, Historical Ethics, and NBAC*, in *HUMAN CLONING 1* (James M. Humber & Robert F. Almeder eds., 1998).

12. See PAUL RAMSEY, *FABRICATED MAN: THE ETHICS OF GENETIC CONTROL* 67-68, 76-79 (1970).

13. See *id.* at 71-72.

14. See *id.* at 86-90.

15. See, e.g., Leon R. Kass, *Making Babies—The New Biology and the "Old" Morality*, 26 PUB. INTEREST 18, 42-45 (Winter 1972); Albert Studdard, *The Lone Clone*, 3 MAN & MED. 109, 110 (1978) (describing arguments by others about the interest or right to genetic distinctiveness).

16. See John D. Rainer, *Commentary*, 3 MAN & MED. 115, 116 (1978).

17. IRA LEVIN, *THE BOYS FROM BRAZIL* (1976).

18. ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932).

19. See Verhey, *supra* note 10, at 228-29.

20. See Joseph Fletcher, *Ethical Aspects of Genetic Controls: Designed Genetic Changes in Man*, 285 NEW ENG. J. MED. 776, 779 (1971); Lewis Thomas, *Notes of a Biology-Watcher: On Cloning a Human Being*, 291 NEW ENG. J. MED. 1296 (1974).

21. See Lederberg, AM. NATURALIST, *supra* note 9, at 527.

and the genes of outsiders to the marriage.<sup>22</sup>

The decades-old discussion of cloning is paralleled by a decades-old discussion of genetic engineering.<sup>23</sup> We can rest assured that by the time scientists really can manipulate a person's genetic makeup, there will be more analysis of the ethical considerations than most people will have time to read.

We see the same anticipation by bioethical thought of developments in medicine with another leading issue in bioethics, physician-assisted suicide and euthanasia. When Dr. Jack Kevorkian assisted the suicide of Janet Adkins in 1990,<sup>24</sup> his action was preceded by repeated controversy over the morality of assisted suicide and euthanasia during the past century. For example, there was a heated debate about euthanasia in this country at the end of the Nineteenth Century and the beginning of the Twentieth Century.<sup>25</sup> Notably, the same arguments that commentators make today in favor and against assisted suicide were made a hundred years ago in the debate about legalizing euthanasia. Those favoring euthanasia cited (1) patient self-determination, (2) the importance of relieving patient suffering, and (3) the absence of any moral distinction between euthanasia and other actions by physicians that might hasten a patient's death, like the withdrawal of medical intervention or the administration of palliative drugs.<sup>26</sup> Supporters of assisted suicide and euthanasia also argued that (4) we have the ability to limit euthanasia to truly compelling cases without sliding down the slippery slope of abuse.<sup>27</sup>

In contrast, opponents of euthanasia argued (1) that there is an important moral distinction between active and passive euthanasia, (2) that patient suffering can be relieved without resorting to euthanasia, (3) that legalizing euthanasia would undermine patient trust in physicians, and (4) that the right to die would become a duty to die. Opponents also argued (5) that patients would choose euthanasia in cases when the physician was mistaken about their prognosis<sup>28</sup> and (6) that euthanasia would not be limited only to appropriate cases but rather that the disabled would be victimized by legalization of euthanasia.<sup>29</sup> Contemporary

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22. See Leon Eisenberg, *The Outcome as Cause: Predestination and Human Cloning*, 1 J. MED. & PHIL. 318, 326 (1976).

23. For some earlier discussions of genetic engineering, see articles reprinted in ETHICS IN MEDICINE: HISTORICAL PERSPECTIVES AND CONTEMPORARY CONCERNS 356-393 (Stanley Joel Reiser et al. eds., 1977). For a more recent discussion, see Council on Ethical and Judicial Affairs, American Medical Association, *Ethical Issues Related to Prenatal Genetic Screening*, 3 ARCH. FAM. MED. 633 (1994).

24. See Lisa Belkin, *Doctor Tells of First Death Using His Suicide Device*, N.Y. TIMES, June 6, 1990, at A1.

25. See Ezekiel J. Emanuel, *The History of Euthanasia Debates in the United States and Britain*, 121 ANNALS INTERNAL MED. 793 (1994).

26. See *id.* at 797-98.

27. See *id.* at 798.

28. See *id.*

29. See *id.* at 798-99. More than 40 years ago, Yale Kamisar wrote a widely cited law review article on "mercy-killing," and he too made many of the same arguments that are made

discussion of physician-assisted suicide adds to the debate in important ways,<sup>30</sup> but one would be seriously mistaken in believing that bioethical thought was unprepared for Dr. Kevorkian.

If it is not in fact true that bioethical thought lags behind developments in science and technology, why is there a persistent myth that the lag exists?

## II. REASONS FOR THE MYTH THAT BIOETHICS LAGS BEHIND SCIENCE AND TECHNOLOGY

### A. Professional Self-Interest

In some ways, it is in the professional self-interest of bioethicists to maintain the myth that the field of bioethics lags behind developments in science and technology. If we in the field were to forthrightly state that bioethical thought has anticipated scientific developments, then the need for current bioethicists would be diminished. The public would often only need someone to point it to the articles that have already been written. For example, in 1997 when the cloning of Dolly the sheep was announced,<sup>31</sup> President Clinton asked the National Bioethics Advisory Commission to study the ethics of cloning and report back to him in ninety days.<sup>32</sup> Instead of launching their analysis of cloning, members of the Commission might have said, "We don't need ninety days to prepare our report. In fact, we don't need really to study the issue at all. Paul Ramsey, Joseph Fletcher and others have done an excellent job debating the morality of cloning over the past thirty years. We can just tell you what they said."

Consider another example of how bioethicists like to reinforce the idea that bioethical thought is only catching up with developments in science and technology. Bioethicists often speak about the youth of the field of bioethics and how the field had its birth just forty years ago.<sup>33</sup> I suspect that Hippocrates, not to mention Maimonides<sup>34</sup> and Percival,<sup>35</sup> would have been surprised to hear that

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today. See Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 MINN. L. REV. 969 (1958).

30. See, e.g., PHYSICIAN ASSISTED SUICIDE: EXPANDING THE DEBATE (Margaret P. Battin et al. eds, 1998); David Orentlicher, *The Legalization of Physician Assisted Suicide: A Very Modest Revolution*, 38 B.C. L. REV. 443 (1997); David Orentlicher, *The Supreme Court and Terminal Sedation: Rejecting Assisted Suicide, Embracing Euthanasia*, 24 HASTINGS CONST. L.Q. 947 (1997).

31. See Wilmut et al., *supra* note 6.

32. See *Letter from the President*, reprinted in CLONING HUMAN BEINGS: REPORT AND RECOMMENDATIONS OF THE NATIONAL BIOETHICS ADVISORY COMMISSION at preface (June 1997).

33. Another leading bioethicist, Albert Jonsen, refers to the birth of bioethics as having occurred in 1947, but he tempers his claim by observing that the field has its roots in earlier thinking. See ALBERT R. JONSEN, THE BIRTH OF BIOETHICS at xii (1998).

34. Moses Maimonides was a noted physician and philosopher, who lived in the Twelfth Century, and is thought by many to have written a prayer that incorporated important principles of

bioethical analysis began in the middle of the Twentieth Century. As Professor Shapiro writes, there may be new issues for bioethicists to consider, but the fundamental concepts of moral analysis are hardly novel.<sup>36</sup> We might want to say that the field of bioethics entered adulthood forty or fifty years ago, but not that it was born at that time.<sup>37</sup> Yet, by characterizing bioethics as a very young field, some bioethicists substantiate the view that bioethics has some catching up to do.

I think that research scientists also like to reinforce the myth that bioethical thought lags behind developments in science and technology. By doing so, they can avoid responsibility for the moral consequences of their work. They can say something like, "we're just scientists working in a morally neutral way to increase our understanding of human life. It is for others to decide whether this is morally acceptable."<sup>38</sup> If, however, scientists were to acknowledge that some types of technology were considered to be ethically problematic, they would have to explain why they were nevertheless pursuing their research into those technologies.<sup>39</sup>

### *B. Traditional Neglect of Historical Examples*

The persistence of the myth that bioethics lags behind science also reflects the tendency of people generally to overlook historical examples. We like to see our era or our generation as unique. Thus, for example, it is often asserted that physician-assisted suicide has become a major issue in recent years because of advances in medical technology. According to common wisdom, the fact that people today die of chronic, degenerative conditions, like cancer and heart disease, rather than from acute, infectious diseases like pneumonia, and the fact that we have modern machines, like dialysis and ventilators, to prolong life has prompted the desire for ways to end life, to avoid a prolonged dying process.<sup>40</sup>

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medical ethics. *See* 4 ENCYCLOPEDIA OF BIOETHICS 2638-39 (Warren Thomas Reich ed., rev. ed. 1995).

35. Thomas Percival was an English physician who authored MEDICAL ETHICS in 1803. *See* JONSEN, *supra* note 33, at 7.

36. *See* Shapiro, *supra* note 1, at 36-37.

37. Even if some scholars are technically correct in saying that bioethics became a distinct academic field 40 or 50 years ago, they create the misleading impression among lay people that bioethical thought began at that time.

38. *See, e.g.*, Robert Marquand, *Cloning Bolts Ahead . . . Toward People?*, CHRISTIAN SCI. MONITOR, Jan. 22, 1998, at 1 (quoting Marcel LaFollette, a science-policy expert at George Washington University, "In the laboratory, . . . you are supposed to carry the research forward without any regard for questions of what is right and wrong.").

39. With some technologies, it will be the case that they can be used ethically or unethically and that the potential ethical uses would be sufficiently weighty to justify development of the technologies. In such cases, scientists would be entitled to pursue their research and rely on others to implement regulations to channel the technologies in the appropriate direction.

40. *See* MARILYN WEBB, THE GOOD DEATH: THE NEW AMERICAN SEARCH TO RESHAPE THE

However, as Ezekiel Emanuel has written, assisted suicide has periodically been advocated in western society, and debates much like we have today existed well before the advent of cancer ventilators, cancer chemotherapy, and dialysis. For example, Emanuel quotes a “typical case” from nearly 2000 years ago in Rome:

[Titius Aristo] has been seriously ill for a long time . . . . He fights against pain, resists thirst, and endures the unbelievable heat of his fever without moving or throwing off his coverings. A few days ago, he sent for me and some of his intimate friends, and told us to ask the doctors what the outcome of his illness would be, so that if it was to be fatal, he could deliberately put an end to his life.<sup>41</sup>

For just about every development in science and technology, abundant bioethics analysis exists, but people have to make the effort to dig the analysis out of the library.<sup>42</sup>

### C. *Lack of Societal Interest in Future Possibilities*

A third reason for the perception that bioethics lags behind technology is the natural societal indifference to efforts by bioethicists to anticipate developments in medicine. When scholars write about future possibilities, people are not likely to pay attention. Why worry about something that may never happen?

If I had written an article about cloning ten years ago and sent it off for publication to a medical journal, here is what probably would have happened: If the journal took my article seriously enough to send it out for peer review, a biologist probably would have responded, “This is a well-written, thoughtful analysis of an interesting problem”—what reviewers always say right before they recommend rejection of an article—“but cloning is simply not biologically possible. Once a cell differentiates, it cannot be made to dedifferentiate.”<sup>43</sup> The journal would also have sent the article out to a bioethicist for review, and the ethicist probably would have said, “This is a well written, thoughtful analysis of an interesting problem, but there are more pressing issues in bioethics to worry about than cloning. We have too many people not receiving basic health care to worry about health care luxuries like cloning, especially when it’s not even a possibility at this time.” If we are going to blame bioethics for not anticipating ethical dilemmas, then we have to blame ourselves for not being willing to listen when bioethicists try to warn us.

All of the reasons I have given so far are not peculiar to bioethics. One could

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END OF LIFE at xxiii (1997).

41. Emanuel, *supra* note 25, at 793.

42. That bioethical analysis precedes developments in science and technology is not surprising. Major advances in research occur step by step rather than in one big leap. Accordingly, there are almost always early indications of new developments before they are actually achieved.

43. See LEE M. SILVER, REMAKING EDEN: CLONING AND BEYOND IN A BRAVE NEW WORLD 96 (1997).

say the same things about other academic disciplines. Economists, political scientists, and other scholars also have incentives to exaggerate the novelty of their work; they also tend to overlook historical examples; and they also are not likely to find interest by others if they write about speculative matters. I suspect, for example, that scholars of ethnic tension between Kosovar Albanians and Kosovar Serbs are finding much more interest in their work now than existed several years ago. If bioethics gets less respect than other academic disciplines, why is that the case?

#### *D. Individual Confidence in the Morality of One's Own Behavior and Thought*

Let me introduce what I think is the answer to this question by recounting some of my experience in teaching ethics. I began teaching bioethics several years ago, at schools of both law and medicine, and I preferred teaching bioethics to the law students. They seemed much more interested in delving into the issues.

To illustrate this apparent difference between law students and medical students, I use an example from a medical school class in which we discussed whether women in their fifties and sixties should be using artificial methods of reproduction to have children.<sup>44</sup> I asked one of the students what she thought about the recent announcement of a fifty-nine-year-old woman giving birth, and the student said something like, "I think it's wrong. It's not natural and the woman could have had kids when she was younger." In response, I said something like, "Doctors always do unnatural things, like transplanting artificial heart valves, and maybe the woman did not find the love of her life, the man with whom she wanted to have children, until she was post-menopausal." The student then replied something like, "I don't care what you say, you're not going to change my mind." My law students would not have responded that way, and this episode reinforced my theory that law students are more inclined to grapple with ethical dilemmas than medical students.

But, when I began to teach professional responsibility, or legal ethics, to law students, I found that those students had about the same interest in discussing issues about legal ethics as medical students in discussing matters of medical ethics. Just as most of my medical students seemed to consider bioethics to be a relatively unimportant course in their curriculum, so did most of my law students seem to consider professional responsibility to be a relatively unimportant course. Just as my medical students seemed to be more interested in my teaching them rules of practice rather than how to analyze ethical dilemmas, so did most of my law students seem more interested in the rules of professional conduct than the underlying principles.

So, my new theory is that people are happy to talk about someone else's

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44. The issue generated public controversy in 1993 when a clinic in Rome reported that a 59-year-old woman gave birth after using the clinic's services. See William E. Schmidt, *Birth to 59-Year-Old Briton Raises Ethical Storm*, N.Y. TIMES, Dec. 29, 1993, at A2.

ethics, but not their own. My law students have been more engaged in my bioethics course than in my professional responsibility course because the students focus on the ethics of physicians in bioethics rather than on their own ethics in professional responsibility.<sup>45</sup> Likewise, I suspect that a course on legal ethics at a *medical* school would be much more interesting to teach than a course on legal ethics at a law school. Medical students would probably have plenty to say about the ethics of lawyers, even if they do not have much interest in hearing about their own ethical obligations.

Why are students more willing to study someone else's professional ethics? I believe the reason why people do not like to critically analyze their own ethics is that people do not like to think that they ever behave unethically. Rather, they prefer to think of themselves as ethical as the next guy. Few people take affront if they are told that they do not understand quantum physics, pathological processes or the intricacies of the federal tax code. People do take affront, however, if someone tells them that they do not understand how to think or act in an ethical way.<sup>46</sup>

Now, if that is how people feel, it follows that they do not need ethics "experts" to tell them how to behave. If I were to conduct a poll and ask people if they thought they were a non-expert in ethical thinking, I suspect I would get very few people to say that they were. In terms of bioethics, I think people see themselves as being in a kind of Lake Wobegon, "where all the people are above average morally."<sup>47</sup>

If we all think that we are experts in ethical thinking and behavior, there is hardly a need for a field of bioethics or a profession of bioethics. In this view, bioethicists are like the Wizard of Oz, acting with a good deal of self importance, but not being able to provide a real service. I suspect that this may be the most important reason why the myth persists that the field of bioethics is somehow deficient.

To be sure, I reject this view. As Professor Shapiro argues so well, thinkers in the field of bioethics have much to offer society. The problem really seems to lie in the reluctance of many members of the public to recognize the assistance that bioethicists can provide society in resolving its ethical dilemmas.

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45. Undoubtedly, part of the differences in my teaching experiences can be explained by the fact that some of my courses are elective and some are required. I have taught required bioethics courses in medical schools and required professional responsibility courses in law schools. Conversely, my bioethics courses at law schools are elective courses.

46. When I was Director of the American Medical Association's Division of Medical Ethics, I noticed a related phenomenon. Physicians were more receptive to guidelines that addressed new ethical issues than to guidelines that called into question existing practices. For example, it was easier to establish guidelines on genetic testing than to restrict the freedom of physicians to treat family members. When existing practices are questioned, it suggests that some people have been acting unethically.

47. In Garrison Keillor's fictional *Lake Wobegon*, "all of the men are good-looking, all of the women are strong, and all of the children are above average." *A Prairie Home Companion* (NPR weekly radio broadcast).

## CONCLUSION

I agree with Professor Shapiro that bioethics is not broken and that it is only a myth that bioethical thought lags behind developments in science and technology. I have argued that this myth reflects a few considerations common to academic fields of inquiry (e.g., the tendency to disregard historical examples) but that it rests primarily in the fact that bioethicists preach their views in an area that is very sensitive for people. It is very difficult to accept the idea that one is not an ethical person, and the idea of an expertise in ethics seems to presuppose the idea that some people are more ethical than others.

How can we respond to social hostility to the idea of bioethics expertise? That is a complicated question that is beyond the scope of this commentary. I will offer one suggestion, however. I suspect that much would be gained if bioethicists were clearer as to the nature of their expertise. To some extent, bioethicists may have contributed to societal skepticism about the value of bioethical thought by misrepresenting their expertise. There is an important difference between claiming expertise in what is right and claiming expertise in the kinds of analysis that can help people determine what is right,<sup>48</sup> and bioethicists have often implied the first when the second is more accurate. That is, when bioethicists suggest that they have a special understanding of what conduct is morally correct, they are on much shakier ground than when they identify their expertise as lying in the process of moral reasoning. By being clearer about their expertise, bioethicists can avoid the tendency to reinforce public skepticism of their field and instead can point the public to a better understanding of their role.

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48. Shapiro, *supra* note 1, at 44-47.

# THE CHANGING FACE OF PRIVACY PROTECTION IN THE EUROPEAN UNION AND THE UNITED STATES

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I am grateful for the thoughtful comments of Professor Ronald J. Krotoszynski, Jr. that appear in this same issue. I agree entirely with his cautionary words about new technologies and the potential dangers of embracing them mindlessly. I commend to the reader his close analysis of cases, especially those involving the First Amendment, although it is clear that I disagree with some of the conclusions he draws from those cases. For example, all of the cases he puts forward as supporting government restraints on information involve *false* expression; I therefore question their predictive value for how the Supreme Court might evaluate a restriction on *true* speech. Similarly, the expression in commercial contexts, which he treats as lower value speech and therefore less worthy of protection under the First Amendment—as did the Court itself in the 1970s and 1980s—I believe is more likely to receive full First Amendment protection today, in light of the fundamental importance of such expression in most of our lives and the Court’s repudiation of *Posadas*. See *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 509 (1996) (holding that the decision in *Posadas* incorrectly performed First Amendment analysis by deferring to the legislature).

Even if, however, Professor Krotoszynski is correct that the Court might conclude that the First Amendment is not an obstacle to a ban on the collection or use of true, lawfully obtained information, my reading of the Constitution and the interests at stake leads me to conclude that the Court *should* not.

I disagree with Professor Krotoszynski’s reading of the Takings Clause and recent Takings jurisprudence. Although the Takings Clause—unlike the First Amendment—is not central to my analysis of information privacy issues and why the government should proceed very cautiously before regulating information to address those issues, it is by no means clear that, as Professor Krotoszynski writes, “a state legislature could simply pass legislation declaring that no property interest accrues from the collection of personal information.” Ronald J. Krotoszynski, Jr., *Identity, Privacy, and the New Information Scalpers: Recalibrating the Rules of the Road in the Age of the Infobahn*, 33 IND. L. REV. 233, 246 (1999). On the contrary, the Court’s solicitude in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), for an entity’s “reasonable investment-backed expectation with respect to its control over the use and dissemination of the data” I believe suggests that states would face significant constitutional hurdles if they were to attempt to prohibit outright the collection or use of data. *Id.* at 1011.

The assertion of Professor Krotoszynski’s that I find most intriguing is his proposal that we eliminate the historical dividing line between the government and everyone else for purposes of regulating the collection and use of personal information. See Krotoszynski, *supra*, at 250-51. The special protection that applies to personal information in the hands of the government is justified on significant constitutional and practical grounds. The current structure of data protection is a trade-off: the government gets the power to compel disclosure of data; in exchange, it is subject to special restraints on its use of those data. To abolish that distinction, either by giving private parties government-like powers to compel citizens to disclose personal information or by weakening the privacy protections applicable to the government by extending them to private entities, seems to me profoundly unwise.

At heart, Professor Krotoszynski’s arguments and mine differ most in terms of the vision they reflect. He writes of “abuses” and “confidential” data without defining what these are. If these terms refer to collecting information illegally, or distributing false and harmful data about an individual, or violating a promise concerning the use of personal information, then current law already provides significant penalties and I agree with him that it should. If, however, as I suspect, Professor Krotoszynski means something broader by these terms, then I do not share the vision that

## INTRODUCTION

"Privacy" is the new hot topic in Washington and other national and state capitals as we head into the new millennium. The debate over privacy is reaching a fevered pitch as policymakers, public interest advocates, and industry leaders clash over how much is enough and over what role the government should play in protecting it. The U.S. Congress, after decades of virtually ignoring privacy issues, considered almost 1000 bills—one out of eight bills introduced—addressing some aspect of privacy in its 104th session. The 105th Congress debated an even broader array of privacy bills, ranging from identity theft<sup>1</sup> to collecting data from children,<sup>2</sup> confidentiality of health care records<sup>3</sup> to employers' use of credit reports,<sup>4</sup> privacy in banking<sup>5</sup> to privacy on the Internet.<sup>6</sup> Congress also held a series of hearings on privacy issues.<sup>7</sup> State legislatures were

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something must be done. My vision is dominated instead by the benefits we all share of a society dominated by open information flows, the wide range of valuable services that such flows make available, the broad array of steps that the very technologies and markets that Professor Krotoszynski laments make available to me to protect my privacy, and fear of burdensome and costly government regulation to protect privacy, such as Europe now enjoys.

Our differences, however, and especially on such fundamental issues, highlight the issues involved in, and the importance of, the growing debate over information privacy. I am grateful to the editors of the *Indiana Law Review* for inviting me to participate in their symposium and to appear alongside Professor Krotoszynski, and I am grateful to Professor Krotoszynski for his insightful commentary. Finally, I want to thank my research assistant, Reid Cox, for his help with this article.

1. See Identity Theft and Assumption Deterrence Act, Pub. L. No. 105-318, 112 Stat. 3007 (1998).

2. See Children's Online Privacy Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

3. See S. 2609, 105th Cong. (1998); H.R. 3900, 105th Cong. (1998); H.R. 3605, 105th Cong. (1998); S. 1712, 105th Cong. (1998); S. 1921, 105th Cong. (1998); H.R. 52, 105th Cong. (1998); S. 1368, 105th Cong. (1998); H.R. 3756, 105th Cong. (1998); S. 1890 and S. 1891, 105th Cong., 2d Sess. (1998).

4. See Consumer Reporting Employment Clarification Act of 1998, Pub. L. No. 105-347, 112 Stat. 3208 (1998).

5. See H.R. 4388, 105th Cong. (1998); H.R. 4478, 105th Cong. (1998).

6. See H.R. 4667, 105th Cong. (1998); H.R. 98, 105th Cong. (1998); H.R. 2368, 105th Cong. (1998); H.R. 4470, 105th Cong. (1998); Children's Online Privacy Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

7. See, e.g., *Protection of Children's Privacy on the World Wide Web: Hearings on S. 2326 "Children's Online Privacy Protection Act of 1998" Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science & Transportation*, 105th Cong. (1998); *National ID Card: Hearings Before the Subcomm. on National Economic Growth, Natural Resources and Regulatory Affairs of the House Government Reform and Oversight*, 105th Cong. (1998); *Financial Information Privacy Act: Hearings Before House Comm. on Banking & Financial Services*, 105th Cong. (1998); *Electronic Commerce: Privacy in Cyberspace: Hearings*

no less attentive to privacy issues. In 1998, 2367 privacy bills were introduced or carried over in U.S. state legislatures; forty-two states enacted a total of 786 bills.<sup>8</sup>

The Federal Trade Commission has led a series of privacy-related initiatives, including a recently completed audit of web site privacy policies.<sup>9</sup> In addition, in 1998 the Commission announced its first Internet privacy case, in which GeoCities, operator of one of the most popular sites on the World Wide Web, agreed to settle Commission charges that it had misrepresented the purposes for which it was collecting personal identifying information from children and adults through its online membership application form and registration forms for children's activities on the GeoCities site.<sup>10</sup> The Commission has announced the conclusion of its second Internet privacy case, a settlement with Liberty Financial Companies, Inc., operator of the Young Investor Web site. The Commission alleged, among other things, that the site falsely represented the personal information collected from children, including information about family finances, would be maintained anonymously.<sup>11</sup> The Department of Commerce convened a major conference on privacy last summer, and the President, Vice President, and Secretary of Commerce have all threatened regulatory action to protect privacy if industry self-regulation does not improve. Privacy even made it into the President's 1999 State of the Union address.<sup>12</sup>

This debate is prompted largely by extraordinary technological innovations

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*Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce, 105th Cong. (1998); Hearings on H.R. 2448 "Protection from Personal Intrusion Act" and H.R. 3224 "The Privacy Protection Act of 1998" Before the House Comm. on the Judiciary, 105th Cong. (1998); Privacy of Individual Genetic Information: Hearings Before the Senate Comm. on Labor and Human Resources, 105th Cong. (1998); Privacy Protection: Hearings on H.R. 2448 "Protection From Personal Intrusion Act" and H.R. 3224 "Privacy Protection Act of 1998" Before the House Comm. on the Judiciary, 105th Cong. (1998); Medical Privacy Protection: Hearings on H.R.52 "The Fair Health Information Practices Act" Before the Subcomm. on Government Management, Information and Technology of the House Comm. on Government Reform and Oversight, 105th Cong. (1998); Privacy in Electronic Communications: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. (1998).*

8. See *Privacy Legislation in the States*, PRIV. & AM. BUS., Nov./Dec. 1998, at 1, 3.

9. See Federal Trade Commission, *Privacy Online: A Report to Congress* (1998) (visited January 3, 2000) <<http://www.ftc.gov/reports/privacy3/index.htm>>.

10. See GeoCities, Docket No. C-3849 (Feb. 12, 1999) (Final Decision and Order available at <<http://www.ftc.gov/os/1999/9902/9823015d&o.htm>>).

11. See Liberty Financial, Case No. 9823522 (proposed consent agreement available at <<http://www.ftc.gov/os/1999/9905/lbtyord.htm>>).

12. "As more of our medical records are stored electronically, the threats to all our privacy increase. Because Congress has given me the authority to act if it does not do so by August, one way or another, we can all say to the American people, we will protect the privacy of medical records and we will do it this year." President William Jefferson Clinton, State of the Union Address (1999) <<http://www.whitehouse.gov/WH/New/html/19990119-2656.html>>.

that are dramatically expanding both the practical ability to collect and use personal data and the economic incentive to do so. Computers and the networks that connect them have become a dominant force in virtually all aspects of society in the United States and throughout the industrialized world. Information services and products today constitute the world's largest economic sector.<sup>13</sup> Institutions and individuals alike are flocking to the Internet—and particularly to the World Wide Web—in record numbers, making it the fastest-growing medium in human history.<sup>14</sup>

First made available to the public in 1992, the Web is used today by more than 147 million people and continues expanding at approximately thirty percent per year.<sup>15</sup> Much of the Web's explosive growth is due to the rapid increase in businesses online. In 1995, World Wide Web hosts designated ".com" for commercial uses slightly outnumbered those designated ".edu" for educational institutions, which were the historical backbone of the Internet. By January 1998, ".com" sites outnumbered their ".edu" counterparts more than two-to-one.<sup>16</sup>

The growth and commercialization of the Web are only two examples of a much larger trend. Computers, computer networks, and digital information increasingly dominate business, government, education and entertainment. Businesses are investing heavily in information technologies and increasingly taking advantage of new information services. Consider these examples:

- ❖ During the 1980s, U.S. businesses alone invested \$1 trillion in information technology;<sup>17</sup> since 1990 they have spent more money on computers and communications equipment than on all other capital equipment combined.<sup>18</sup> This trend is reflected throughout the economy. Beginning in 1996, for example, U.S. consumers have purchased more computers each year than televisions.<sup>19</sup>
- ❖ A 1999 University of Texas study calculates that the Internet generated \$301 billion in revenue in the United States last year, including \$102 billion in

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13. See *National Telecommunications and Information Administration Fact Sheet*, May 30, 1995, at 2.

14. Only five years after its creation, it reached more than 50 million homes in the United States. By comparison, it took 38 years for radio to reach 50 million U.S. homes, 13 for television, and 10 for cable.

15. See *The Big Picture Geographics* (visited Dec. 1, 1999) <[http://cyberatlas.internet.com/big\\_picture/geographics/cia.html](http://cyberatlas.internet.com/big_picture/geographics/cia.html)>.

16. See *Host Distribution by Top-Level Domain Names* (visited Dec. 1, 1999) <<http://www.nw.com/zone/WWW-9501/dist-byname.html>>; *Distribution by Top-Level Domain Name by Name* (visited Dec. 1, 1999) <<http://www.nw.com/zone/WWW/dist-bnum.html>>.

17. See Howard Gleckman, *The Technology Payoff*, BUS. WEEK, Jun. 14, 1993, at 57.

18. See Larry Irving, *Equipping Our Children with the Tools to Compete Successfully in the New Economy*, remarks to the Conference on Technology and the Schools: Preparing the New Workforce for the 21st Century, Randolph Center, VT, Oct. 28, 1996 <[http://www.ntia.doc.gov.ntiahom/speeches/1028961i\\_vermont.html](http://www.ntia.doc.gov.ntiahom/speeches/1028961i_vermont.html)>.

19. See *id.* See generally FRED H. CATE, *PRIVACY IN THE INFORMATION AGE* 5-7 (1997).

on-line sales. By comparison, the U.S. telecommunications industry accounted for \$270 billion in revenue during the same period.<sup>20</sup>

- ❖ The Internet now carries twenty-five times more mail within the United States each day than the U.S. Post Office. The Electronic Messaging Association reports that about four trillion e-mails were received in the United States in 1998, up from two trillion in 1997. By contrast, the U.S. Postal Service handles about 160 billion letters and packages per year.<sup>21</sup>
- ❖ A Booz-Allen Hamilton study found that a single banking transaction costs \$1.08 at a bank branch, sixty cents at an ATM machine, twenty-six cents with PC banking, but only thirteen cents on the Internet.<sup>22</sup>
- ❖ Alamo Rent-a-Car trimmed an estimated \$1 million from its administrative budget by opening a Web site that lets tour operators tap directly into reservation and billing systems. Airlines are offering incentives for customers to book travel online, and many companies and government offices now handle procurement and manage relations with vendors exclusively online.<sup>23</sup>
- ❖ During first quarter 1997, Dell Computer Corporation sold more than \$1 million of computers every day via the Internet. By the third quarter, that figure had risen to \$3 million per day. Eighteen months later it is more than \$14 million per day.<sup>24</sup>

As we see, the dominance of the Internet and of digital information generally is reflected clearly in the degree to which activities wholly unrelated to the provision or transmission of information—such as banking, insurance, air transportation, medicine, and even heavy industries like automobile production—are being transformed by information technologies.

The extraordinary role of information products and services and their transforming affect on virtually all aspects of human activity are certainly not limited to the United States. Currently 205 countries are connected to the Internet. Moreover, the U.S. share of Internet users is declining. According to studies by Computer Industry Almanac, Inc., in 1981 eighty percent of Internet users were in the United States; by 1994 that figure had fallen to sixty-five percent; and by the end of 1997, fifty-five percent of Internet users were in the United States.<sup>25</sup> One year later, the United States accounted for only fifty-two

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20. See *The Internet Economy Indicators* (visited Dec. 1, 1999) <<http://www.InternetIndicators.com>>.

21. See *As E-Mail Grows Up, So Do the Uses for It*, GLOBE AND MAIL (Toronto), Oct. 13, 1998, at C2; *Notebook*, TIME, Jan. 25, 1999, at 15.

22. See Sharon Reier, *Battlelines Are Forming for Next "War of Wires,"* INT'L HERALD TRIB., Sept. 30, 1996.

23. See Clinton Wilder, *Big Businesses Head to Online Procurement*, TECHWEB NEWS, Nov. 23, 1998, at 1.

24. See *Dell Tops \$18 Billion in Annual Revenue; Internet Sales Rise to \$14 Million per Day; Company Announces 2-for-1 Stock Split*, BUS. WIRE, Feb. 16, 1999.

25. See Computer Industry Almanac Inc., *Top 15 Countries with the Most Internet Users* (visited Dec. 1, 1999) <<http://www.c-i-a.com/199801pr.htm>>.

percent of people worldwide who use the Internet at least once each week.<sup>26</sup> Finland, Norway, and Iceland all have higher per capita percentages of Internet users than the United States.<sup>27</sup>

The result of this extraordinary proliferation of computers and networks is that more data than ever before is made available in digital format, which is significant because digital information is easier and less expensive than nondigital data to access, manipulate, and store, especially from disparate, geographically distant locations. Also more data is generated in the first place because of the ease of doing so, the very low cost, and the high value of data in an increasingly information-based society. Data often substitutes for what would previously have required a physical transaction or commodity. In electronic banking transactions, for example, no currency changes hands, only data. And recorded data, such as a list of favorite web sites or an automatically generated back-up copy of a document, also makes the use of computers easier, more efficient, and more reliable. Finally, computer technologies and services often record a wide array of data necessary to complete a transaction or make its use more convenient, such as the web sites visited or the time and date an e-mail message is sent.

The ramifications of such a readily accessible storehouse of electronic information are astonishing: other people know more about you—even things you may not know about yourself—than ever before. Data routinely collected about you includes your health, credit, marital, educational, and employment histories; the times and telephone numbers of every call you make and receive; the magazines to which you subscribe and the books you borrow from the library; your cash withdrawals; your purchases by credit card or check; your electronic mail and telephone messages; and where you go on the World Wide Web.<sup>28</sup>

According to a 1994 estimate, U.S. computers alone held more than five billion records, trading information on every man, woman, and child an average of five times every day. Just one industry—credit reporting—accounted for 400 million credit files, which are updated with more than two billion entries every month.<sup>29</sup>

As a result, a growing number of citizens and lawmakers in the United States and around the world are concerned about protecting privacy. According to a June-July 1998 *Privacy & American Business/Louis Harris* survey, eighty-seven percent of the 1008 respondents reported being “concerned” or “very concerned” about personal privacy. Eighty-two percent said they had “lost all control over how personal information is circulated and used by companies,” and sixty-one percent said that their privacy was not protected adequately by law or business

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26. See *Latest Headcount: 148 Million Online* (visited Dec. 1, 1999) <[http://cyberatlas.internet.com/big\\_picture/geographics/cia.html](http://cyberatlas.internet.com/big_picture/geographics/cia.html)>.

27. See Computer Industry Almanac Inc., *15 Leading Countries in Internet Users Per Capita* (visited Dec. 1, 1999) <<http://www.c-i-a.com/19980319.htm>>.

28. See James Gleick, *Big Brother Is Us*, N.Y. TIMES, Sep. 29, 1996, at F1.

29. See 142 CONG. REC. S11,868 (Sep. 30, 1996) (statement of Sen. Bryan); Steven A. Bibas, *A Contractual Approach to Data Privacy*, 17 HARV. J. L. & PUB. POL'Y 591, 593 (1994).

practices. Seventy-eight percent of respondents said that they had refused to give out personal information because of concern for their privacy.<sup>30</sup> A *Business Week/Harris* poll, released in March 1998, suggests that concern about privacy may be escalating. Seventy-eight percent of the 999 respondents said that they would use the Web more if privacy were better protected, and fifty percent of current Internet users responded that the government should pass laws now to regulate how personal data is collected and used on the Internet.<sup>31</sup> Surveys in other nations yield similar results.

As Marc Rotenberg, Director of the Washington-based Electronic Privacy Information Center, has observed: "Privacy will be to the information economy of the next century what consumer protection and environmental concerns have been to the industrial society of the 20th century."<sup>32</sup>

Among the wide variety of national and multinational legal regimes for protecting privacy, two dominant models have emerged, reflecting two very different approaches to the control of information. The European Union ("EU") has enacted a sweeping data protection directive that imposes significant restrictions on most data collection, processing, dissemination, and storage activities, not only within Europe, but throughout the world if the data originates in a member state. The United States has taken a very different approach that extensively regulates government processing of data, while facilitating private, market-based initiatives to address private-sector data processing.

The interaction between these two systems is of far more than merely academic interest. The EU and the United States are each other's largest trading partners, with total trade and investment exceeding \$1 trillion annually.<sup>33</sup> Moreover, information, especially digital information, is inherently global. Data ignores national and provincial borders, and, unlike a truckload of steel or a freight train of coal, data is difficult to pinpoint and almost impossible to block, through either legal or technological means. As a result, the laws applicable to information of one nation or group of nations inherently impact other nations; when nations pursue different legal regimes applicable to information, conflict between those laws is inevitable. In the case of the EU and the United States, that conflict implicates core values.

Under the EU data protection directive, information privacy is a basic human right; the failure of the U.S. legal system to treat it as such offends European values and has led the EU to threaten to suspend information flows to the United States. This threat is understandable in light of the directive's treatment of privacy as a human right, and the threat is necessary if the privacy of European nationals is to be protected effectively in a global information economy. In the United States, however, the government is constitutionally prohibited under the First Amendment from interfering with the flow of information, except in the

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30. See P&AB Survey Overview: *Consensual Marketing Is Coming*, PRIV. & AM. BUS., Jan./Feb. 1999, at 1, 4-5.

31. See Heather Green et al., *A Little Privacy, Please*, BUS. WEEK, Mar. 16, 1998, at 98.

32. *Id.; see generally* CATE, *supra* note 19, at 90.

33. See David L. Aaron, *Euro-age Bright for US Firms*, J. COMMERCE, Jan. 14, 1999, at 6A.

most compelling circumstances. The EU data protection directive is plainly contrary to that constitutional maxim, and the suggestion that the directive should be extended to the United States exacerbates that conflict, as well as threatens U.S. leadership in information technologies and services.

This Article examines the expanding conflict and emerging compromises between the EU and the United States over data protection. Part II briefly examines the requirements of the EU directive, particularly with regard to transborder data flows; the interpretative statements of European regulators about the directive's requirements; and implementation of the directive by member states. Part III examines the framework for privacy protection in the United States and the limits imposed on that framework by the Constitution. The Article concludes by addressing the conflict between the fundamental principles undergirding the European and U.S. systems of data protection, current political efforts to minimize that conflict, and the inadequacies of both systems in the context of the Internet.

## I. EUROPEAN UNION

### *A. Data Protection Directive*

Europe was the site of the first national privacy legislation, beginning with Sweden in 1973, and today virtually all European countries have broad privacy or data protection statutes.<sup>34</sup> Those statutes have been paralleled and, in some cases, anticipated by multinational action. In 1980 the Committee of Ministers of the Organization for Economic Cooperation and Development (OECD)<sup>35</sup> issued *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*.<sup>36</sup> The guidelines outline basic principles for both data protection and the free flow of information among countries that have laws conforming with the protection principles. The guidelines, however, have no binding force and permit broad variation in national implementation.

One year after the OECD issued its guidelines, the Council of Europe promulgated a convention *For the Protection of Individuals with Regard to*

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34. In 1970 the German state of Hesse enacted the first data protection statute; Sweden followed in 1973 with the first national statute. Today, Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom have broad privacy or data protection statutes. See CATE, *supra* note 19, at 32-34.

35. The OECD was founded in 1960 by 20 nations, including the United States, "to promote economic and social welfare throughout the OECD area by assisting member governments in the formulation and coordination of policies; to stimulate and harmonize members' aid efforts in favor of developing nations; and to contribute to the expansion of world trade." Robert C. Boehmer & Todd S. Palmer, *The 1992 EC Data Protection Proposal: An Examination of Its Implications for U.S. Business and U.S. Privacy Law*, 31 AM. BUS. L.J. 265, 271 n.33 (1993).

36. O.E.C.D. Doc. (C 58 final) (Oct. 1, 1980).

*Automatic Processing of Personal Data.*<sup>37</sup> The Convention, which took effect in 1985, is similar to the Guidelines, although it focuses more on the importance of data protection to protect personal privacy.

The resulting protection for personal privacy was far from uniform, for at least four reasons. First, not all of the Council of Europe member states had adopted implementing legislation. In fact, by 1992, only ten countries—Austria, Denmark, France, Germany, Ireland, Luxembourg, Norway, Spain, Sweden, and the United Kingdom—had ratified the Convention, while eight—Belgium, Cyprus, Greece, Iceland, Italy, Netherlands, Portugal, and Turkey—had signed without ratification.<sup>38</sup> Second, some of the national data protection legislation existed prior to adoption of the Convention. Third, the Convention was not self-executing and therefore both permitted each country to implement its national laws conforming to the Convention's terms in very different ways and denied rights to citizens in those countries which had failed to ratify the convention. Finally, the Convention did not include definitions for important terms, such as what constitutes an “adequate” level of data protection; as a result, member countries were free to adopt inconsistent definitions in their national legislation.

As a result of the variation and uneven application among national laws permitted by both the guidelines and the convention, in July 1990, the Commission of the then-European Community published a draft *Council Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data*.<sup>39</sup> The draft directive was part of the ambitious program by the countries of the EU<sup>40</sup> to create not merely the “common market” and “economic and monetary union” contemplated by the Treaty of Rome,<sup>41</sup> but also the political union embodied in the Treaty on European Union signed in 1992 in Maastricht.<sup>42</sup>

The shift from economic to broad-based political union brought with it new attention to the protection of information privacy. On March 11, 1992, the European Parliament amended the commission's proposal to eliminate the distinction in the 1990 draft between public- and private-sector data protection and then overwhelmingly approved the draft directive. On October 15, 1992, the Commission issued its amended proposal; on February 20, 1995, the Council of

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37. Eur. T.S. No. 108 (Jan. 28, 1981).

38. See generally Joel R. Reidenberg, *The Privacy Obstacle Course: Hurdling Barriers to Transnational Financial Services*, 60 FORD. L. REV. S137, S143-48 (1992).

39. Com(92)422 final-SYN 287 (Oct. 15, 1992).

40. The 15 current members of the EU are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom.

41. Treaty Establishing the European Economic Community, Mar. 25, 1957, 28 U.N.T.S. 3, art. 2 (1958), as amended by the Single European Act, O.J. (L 169) 1 (1987), [1987] 2 C.M.L.R. 741, and the Treaty on European Union, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 719, reprinted in 31 I.L.M. 247 (1992).

42. Treaty on European Union, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 719, reprinted in 31 I.L.M. 247 (1992).

Ministers adopted a *Common Position with a View to Adopting Directive 94/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data.*<sup>43</sup> The directive was formally approved on October 24, 1995, and took effect three years later.<sup>44</sup> On October 25, 1998, data protection law became significantly stronger throughout Europe.

The directive requires each of the fifteen EU member states to enact laws governing the “processing of personal data,” which the directive defines as “any operation or set of operations,” whether or not automated, including but not limited to “collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.”<sup>45</sup> “Personal data” is defined equally broadly as “any information relating to an identified or identifiable natural person.”<sup>46</sup> This would include not only textual information, but also photographs, audiovisual images, and sound recordings of an identified or identifiable person, whether dead or alive.

As a practical matter, the directive does not apply in only two contexts: activities outside of the scope of Community law, such as national security and criminal law, and the processing of personal data that is performed by a “natural person in the course of a purely private and personal activity.”<sup>47</sup>

National laws enacted in compliance with the directive must guarantee that “processing of personal data” is accurate, up-to-date, relevant, and not excessive. Personal data may be used only for the legitimate purposes for which they were collected and kept in a form that does not permit identification of individuals longer than is necessary for that purpose. Personal data may be processed only with the consent of the data subject, when legally required, or to protect “the public interest” or the “legitimate interests” of a private party, except when those interests are trumped by the “interests of the data subject.”<sup>48</sup> The processing of personal data revealing “racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life”<sup>49</sup> is severely restricted and in most cases forbidden without the written permission of the data subject.<sup>50</sup>

The directive requires member states to enact laws guaranteeing individuals access to, and the opportunity to correct, processed information about them. At a minimum, those laws must permit data subjects “to obtain, on request, at

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43. 1995 O.J. (C 93) 1.

44. See Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data 1995 O.J. 95 (L281) [hereinafter *Directive 95/46/EC*].

45. *Id.* art. 2(b).

46. *Id.* art. 2(a).

47. *Id.* art. 3(2).

48. *Id.* art. 7.

49. *Id.* art. 8.

50. *See id.*

reasonable intervals and without excessive delay or expense, confirmation of the existence of personal data relating to them, communication to them of such data in an intelligible form, an indication of their source, and general information on their use.”<sup>51</sup>

National laws under the directive must also permit data subjects to correct, erase or block the transfer of “inaccurate or incomplete data,”<sup>52</sup> and the opportunity to object at any time “on legitimate grounds” to the processing of personal data.<sup>53</sup> The directive requires that data subjects be offered the opportunity to have personal data erased without cost before they are disclosed to third parties, or used on their behalf, for direct mail marketing.

Data processors must inform persons from whom they intend to collect data, or from whom they have already collected data without providing this disclosure, of the purposes for the processing; the “obligatory or voluntary” nature of any reply; the consequences of failing to reply; the recipients or “categories of recipients” of the data; and the data subject’s right of access to, and opportunity to correct, data concerning her.<sup>54</sup>

The directive requires that data processors—called “controllers” in the directive—notify the applicable national “supervisory authority” before beginning any data processing.<sup>55</sup> “Controller” is such a menacing term; under the directive, “controllers” include not only giant data processing companies, but also individuals who record the names and addresses of business contacts in their data organizers; students operating web sites which invite visitors to register; and neighborhood children who record orders for Girl Scout cookies.

Under the directive, member states’ national laws must require that the notification include, at a minimum: the name and address of the controller; the purpose for the processing; the categories of data subjects; a description of the data or categories of data to be processed; the third parties or categories of third parties to whom the data might be disclosed; any proposed transfers of data to other countries; and a description of measures taken to assure the security of the processing. Controllers must also notify the supervisory authority of changes in any of the above information.

Each member state must establish an independent public authority to supervise the protection of personal data. Each “supervisory authority” must have, at minimum, the power to investigate data processing activities, including a right of access to the underlying data, as well as the power to intervene to order the erasure of data and the cessation of processing, and to block proposed transfer of data to third parties. The supervisory authority must also be empowered to hear complaints from data subjects and must issue a public report, at least annually, concerning the state of data protection in the country. The directive requires each supervisory authority to investigate data processing that

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51. *Id.* art. 13(1).

52. *Id.* art. 14(3).

53. *Id.* art. 15(1).

54. *Id.* art. 11(1).

55. *Id.* art. 18(1).

“poses specific risks to the rights and freedoms of individuals.”<sup>56</sup> Each supervisory authority is required to keep and make available to the public a “register of notified processing operations.”<sup>57</sup>

The directive requires that member states’ laws provide for civil liability against data controllers for unlawful processing activities, and provide “dissuasive” penalties for noncompliance with the national laws adopted pursuant to the directive.<sup>58</sup> In addition to requiring the supervisory authority to enforce those laws and to hear complaints by data subjects, the directive mandates creation of a “right of every person to a judicial remedy for any breach of the rights guaranteed by this Directive.”<sup>59</sup>

Finally, and most central in ongoing U.S.-EU discussions about data protection and trade, Article 25 of the directive requires member states to enact laws prohibiting the transfer of personal data to non-member states that fail to ensure an “adequate level of protection,”<sup>60</sup> although member states are forbidden from restricting the flow of personal data among themselves because of data protection or privacy concerns.<sup>61</sup> The directive provides that the adequacy of the protection offered by the transferee country “shall be assessed in the light of all circumstances surrounding a data transfer,” including the nature of the data, the purpose and duration of the proposed processing, the “rules of law, both general and sectoral,” in the transferee country and the “professional rules and security measures which are complied with” in that country.<sup>62</sup>

The prohibition in Article 25 is subject to exemptions, provided in Article 26, when (1) the data subject has consented “unambiguously” to the transfer; (2) the transfer is necessary to the performance of a contract between the data subject and the controller or of a contract in the interest of the data subject concluded between the controller and a third party; (3) the transfer is legally required or necessary to serve an “important public interest”; (4) the transfer is necessary to protect “the vital interests of the data subject;” or (5) the transfer is from a “register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate legitimate interest. . . .”<sup>63</sup>

Because of the difficulty of separating data collected within Europe from data collected elsewhere, the directive effectively requires multinational businesses to conform all of their data processing activities to European law. Even businesses that do not operate in Europe may violate the directive if they collect, process, or disseminate personal data about European nationals or via multinational networks.

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56. *Id.* art. 18(4).

57. *Id.* art. 21.

58. *Id.* arts. 23, 25.

59. *Id.* art. 22.

60. *Id.* art. 25(1).

61. *See id.* art. 25(2).

62. *Id.*

63. *Id.* art. 26(1).

Effective October 1998, these became the minimum levels of protection; individual states have the freedom to adopt more stringent protection.<sup>64</sup>

### *B. European Privacy Concepts and Principles*

The EU data protection directive and national European data protection laws reflect at least eight broad, overlapping principles.

1. *Purpose Limitation Principle*.—The first principle of European data protection requires that information be collected only for specific and specified purposes, used only in ways that are compatible with those purposes, and stored no longer than is necessary for those purposes. An important corollary to the purpose limitation principle is that information unnecessary to those purposes should not be collected.<sup>65</sup>

2. *Data Quality Principle*.—The data quality principle requires that information be accurate and up-to-date.

3. *Data Security Principle*.—The data security principle requires that measures appropriate to the risks involved be taken to protect the security of data processing and transmission. The focus of this principle is not only to protect the physical data from “accidental or unlawful destruction or accidental loss,” but also to ensure compliance with European laws prohibiting “unauthorized alteration or disclosure or any other unauthorized form of processing.”<sup>66</sup>

4. *Special Protection for Sensitive Data Principle*.—The principle that special protection be provided for sensitive data requires that there be restrictions on, and special government scrutiny of, data collection and processing activities of information identifying “racial or ethnic origin, political opinions, religious beliefs, philosophical or ethical persuasion . . . [or] concerning health or sexual life.”<sup>67</sup> Under the directive, such data collection or processing is generally forbidden outright.

5. *Transparency Principle*.—Guaranteeing transparent processing of personal data requires that processing activities “be structured in a manner that will be open and understandable.”<sup>68</sup> At minimum, this requires that individuals about whom personal information is to be collected be informed of that fact, the purposes for which the data will be used, and the identity of the person

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64. Article 32 permits member states to delay compliance with the directive in two areas. First, member states may allow existing processing to continue under current rules for up to three years after the date on which the implementing national law or regulations come into effect. Second, member states may exempt the processing of data “already held in manual filing systems” from the application of most substantive provisions of the directive until as late as October 24, 2007. However, during the long transition to full coverage, individuals are to be allowed access to manual files concerning them, with the right to demand correction or deletion of inaccurate data. *See id.* art. 32.

65. *See PAUL M. SCHWARTZ & JOEL R. REIDENBERG, DATA PRIVACY LAW 13-14 (1996).*

66. *Directive 95/46/EC, supra* note 44, art. 17(1).

67. *Id.* art. 8.

68. SCHWARTZ & REIDENBERG, *supra* note 65, at 15.

responsible for the data collection. In most cases, European law seems to indicate that consent must be obtained before personal information is collected or processed.

6. *Data Transfers Principle*.—The data transfer principle restricts authorized users of personal information from transferring that information to third parties without the permission of the data subject. In the case of transborder transfers, the directive prohibits data transfers outright to countries lacking an “adequate level of protection.”<sup>69</sup>

7. *Independent Oversight Principle*.—The last two principles are closely related. The independent oversight principle requires that there be effective and independent oversight of data processing activities. At minimum, this seems to require that some authority have the power to audit data processing systems, investigate complaints brought by individuals, and enforce sanctions against noncomplying data processors. Under the directive, that oversight includes registration of all data processors and collection and processing activities. As a result, no person in Europe, other than an individual engaged in a “purely private and personal activity,”<sup>70</sup> may collect information that identifies specific individuals without the knowledge and permission of a national government.

8. *Individual Redress Principle*.—The individual redress principle requires that individuals have a right to access their personal information, correct inaccurate information, and pursue legally enforceable rights against data collectors and processors who fail to adhere to the law. This principle seems to require not only that individuals have enforceable rights against data users, but also that individuals have recourse to courts or a government agency to investigate and/or prosecute noncompliance by data processors. The directive would require that individuals have the opportunity to have recourse to independent government authorities empowered to investigate and prosecute complaints.

With these eight principles, the data protection directive marks the high-water mark of legal protection for information privacy. It is distinguished by its breadth in the data, activities, and geographic area to which it applies. It is very much a European product, reflecting the tenor of predecessor national data protection laws and the economic demand for a larger, more unified EU.

### C. Interpretation of the Directive by the Article 29 Working Party

Article 29 of the EU directive created a “Working Party on the Protection of Individuals with regard to the Processing of Personal Data,” charged with interpreting key portions of the directive.<sup>71</sup> The Working Party is composed of representatives from member states’ data protection authorities and from the EU itself. Under Article 30, the Working Party is given broad responsibilities, including the power to “give the Commission an opinion on the level of

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69. *Directive 95/46/EC*, *supra* note 44, art. 25(1).

70. *Id.* art. 3(2).

71. *See id.* art. 29.

protection in . . . third countries;" "on its own initiative, make recommendations on all matters relating to the protection of persons with regard to the processing of personal data in the Community;" and "draw up an annual report on the situation regarding the protection of natural persons with regard to the processing of personal data in the Community and in third countries."<sup>72</sup>

The Working Party met for the first time on January 17, 1996, and since that time, under the chairmanship of Peter J. Hustinx, President of the Dutch data protection authority, the Working Party has focused extensive attention on data transfers to non-European countries under Articles 25 and 26. The Working Party's conclusions to date are reflected in a series of working documents, which were reissued in July 1998 into a single document.<sup>73</sup>

1. *Objectives.*—The Working Party has identified three objectives that any data protection system must satisfy to comply with the directive's "adequacy" requirement:

- 1) deliver a good level of compliance with the rules. (No system can guarantee 100% compliance, but some are better than others). A good system is generally characterized by a high degree of awareness among data controllers of their obligations, and among data subjects of their rights and the means of exercising them. The existence of effective and dissuasive sanctions can play an important role in ensuring respect for rules, as of course can systems of direct verification by authorities, auditors, or independent data protection officials.
- 2) provide support and help to individual data subjects in the exercise of their rights. The individual must be able to enforce his/her rights rapidly and effectively, and without prohibitive cost. To do so there must be some sort of institutional mechanism allowing independent investigation of complaints.
- 3) provide appropriate redress to the injured party where rules are not complied with. This is a key element which must involve a system of independent adjudication or arbitration which allows compensation to be paid and sanctions imposed where appropriate.<sup>74</sup>

These three objectives focus on the availability of independent verification, investigation, and enforcement, and of compensation and other sanctions for failure to comply with substantive data protection obligations.

2. *Substantive Rules.*—The substantive rules identified by the Working Party as a precondition to a finding of "adequacy" include:

- 1) the purpose limitation principle—data should be processed for a

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72. *Id.* arts. 30(1)(b), (3), (6).

73. WORKING PARTY ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA, WORKING DOCUMENT ON TRANSFERS OF PERSONAL DATA TO THIRD COUNTRIES: APPLYING ARTICLES 25 AND 26 OF THE EU DATA PROTECTION DIRECTIVE (July 24, 1998) [hereinafter TRANSFERS OF PERSONAL DATA TO THIRD COUNTRIES].

74. *See id.*

specific purpose and subsequently used or further communicated only insofar as this is not incompatible with the purpose of the transfer. . . .

2) the data quality and proportionality principle—data should be accurate and, where necessary, kept up to date. The data should be adequate, relevant and not excessive in relation to the purposes for which they are transferred or further processed.

3) the transparency principle—individuals should be provided with information as to the purpose of the processing and the identity of the data controller in the third country, and other information insofar as this is necessary to ensure fairness. . . .

4) the security principle—technical and organizational security measures, should be taken by the data controller that are appropriate to the risks presented by the processing. Any person acting under the authority of the data controller, including a processor, must not process data except on instructions from the controller.

5) the rights of access, rectification and opposition—the data subject should have a right to obtain a copy of all data relating to him/her that are processed, and a right to rectification of those data where they are shown to be inaccurate. In certain situations he/she should also be able to object to the processing of the data relating to him/her. . . .

6) restrictions on onward transfers—further transfers of the personal data by the recipient of the original data transfer should be permitted only where the second recipient (i.e., the recipient of the onward transfer) is also subject to rules affording an adequate level of protection.<sup>75</sup>

According to the Working Party, certain types of data processing must be subject to additional controls. Those situations include:

1) sensitive data—where “sensitive” categories of data are involved [data concerning “racial or ethnic origin, political opinions, religious beliefs, philosophical or ethical persuasion . . . [or] concerning health or sexual life”<sup>76</sup>] additional safeguards should be in place, such as a requirement that the data subject gives his/her explicit consent for the processing.

2) direct marketing—where data are transferred for the purposes of direct marketing, the data subject should be able to “opt-out” from having his/her data used for such purposes at any stage.

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75. *Id.*

76. *Directive 95/46/EC, supra* note 44, art. 8.

3) automated individual decision—where the purpose of the transfer is the taking of an automated decision in the sense of Article 15 of the directive, the individual should have the right to know the logic involved in this decision, and other measures should be taken to safeguard the individual's legitimate interest.<sup>77</sup>

3. *Self-regulation.*—Recognizing that few if any other countries provide the level of statutory data protection that the EU data protection directive requires, the Working Party has addressed the extent to which extra-legal mechanisms—particularly industry self-regulation and private contracts—may satisfy the requirements of Article 25.

The Working Party has defined self-regulation as “any set of data protection rules applying to a plurality of data controllers from the same profession or industry sector, the content of which has been determined primarily by members of the industry or profession concerned.”<sup>78</sup> The Working Party stressed that the standard for judging “adequacy” must continue to be the six substantive and three procedural requirements identified for evaluating data protection laws. Again, much of the Working Party’s discussion of self-regulatory measures focused on the importance of assuring independent verification, investigation, and enforcement, and of providing compensation and other sanctions for failure to comply with substantive data protection obligations. For example, the Working Party has concluded that “remedial” sanctions are insufficient; “genuinely dissuasive and punitive” sanctions must also be available to provide an incentive for future compliance with self-regulatory standards. Similarly, the Working Party would require an “independent” arbiter or adjudicator, either “from outside the profession or sector concerned” or, if a body including industry representatives, including at least an equal number of “consumer representatives.”<sup>79</sup>

4. *Contracts.*—As with self-regulation, the Working Party has stressed that for a contract to provide adequate data protection, it must comply with the nine principles identified above. This, the Working Party concludes, is “a major though not impossible challenge.”<sup>80</sup> Because of the difficulties inherent in enforcing contractual terms for data protection on a party outside of the EU, the Working Party discusses in detail mechanisms for maintaining European oversight. “The preferred solution,” according to the Working Party,

would be for the contract to provide that the recipient of the transfer has no autonomous decision-making power in respect of the transferred data, or the way in which they are subsequently processed. The recipient is bound in this case to act solely under the instructions of the transferor, and while the data may have been physically transferred outside of the EU, decision-making control over the data remains with the entity who

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77. TRANSFERS OF PERSONAL DATA TO THIRD COUNTRIES, *supra* note 73.

78. *Id.*

79. *Id.*

80. *Id.*

made the transfer based in the Community. The transferor thus remains the data controller, while the recipient is simply a sub-contracted processor. In these circumstances, because control over the data is exercised by an entity established in an EU Member State, the law of the Member State in question will continue to apply to the processing carried out in the third country, and furthermore the data controller will continue to be liable under that Member State law for any damage caused as a result of an unlawful processing operation.<sup>81</sup>

This describes few of the situations in which data are currently transferred from one country to another. However, the Working Party goes on to consider alternatives for maintaining European oversight over such transfers:

- the transferor, perhaps at the moment of obtaining the data initially from the data subject, could enter into a separate contractual agreement with the data subject stipulating that the transferor will remain liable for any damage or distress caused by the failure of the recipient of a data transfer to comply with the agreed set of basic data protection principles.<sup>82</sup>
- a member state could enact a national law specifying continuing liability for data controllers transferring data outside the Community for damages incurred as a result of the actions of the recipient of the transfer.<sup>83</sup>
- a member state could require a contractual term which grants the supervisory authority of the member state in which transferor of the data is established a right to inspect, either directly or through an agent, the processing carried out by the processor in the third country.<sup>84</sup>
- a standards body or specialist auditing firm could be required to provide external verification of the recipient's processing activities.<sup>85</sup>

Despite the availability of these and other alternatives, the Working Party is openly skeptical about the practicality of using contracts to provide for adequate data protection. The Working Party has stressed that "there remain significant doubts as to whether it is proper, practical, or indeed feasible from a resource point of view, for a supervisory authority of an EU Member State to take responsibility for investigation and inspection of data processing taking place in a third country."<sup>86</sup> In addition, all contracts with private parties are subject to the laws of the countries in which those parties are domiciled. A number of those laws may impose disclosure obligations (relating, for example, to tax regulations, securities and commodities rules, civil and criminal discovery orders) on private

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81. *Id.* (footnotes omitted).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

parties that clearly trump any contractual obligations. The problem of such an overriding law “simply demonstrates the limitations of the contractual approach. In some cases a contract is too frail an instrument to offer adequate data protection safeguards, and transfers to certain countries should not be authorized.”<sup>87</sup>

5. *Exemptions.*—Finally, the Working Party has stressed that the exemptions from the adequacy requirement, set forth in Article 26, are to be construed “restrictively.” For example, the Working Party has concluded that for an individual to consent to the transfer of data concerning him or her to a country lacking adequate data protection, that consent must be unambiguous, freely given, specific to each proposed transfer, and informed, not just to the nature of the transfer but also as to the “particular risks” posed by each transfer.<sup>88</sup>

The Working Party’s broad reading of Article 25’s restriction on transborder transfers of personal data and its narrow reading of the exemptions to that restriction in Article 26 create a high standard for what constitutes “adequate” data protection.

#### *D. Implementation of the Directive*

The data protection directive—like all EU directives—requires that member states enact statutes transposing its terms into national law. Those national laws may offer greater, but not less, protection than the directive, but they may not impose any limits on the movement of data among member states. Those laws are interpreted in the first instance by national courts. However, because the laws are carrying out the requirements of a directive, the ultimate judicial interpreter of the national laws is the European Court of Justice. Member states which fail to comply by the effective date of the directive can be sanctioned by the EU. Moreover, in certain circumstances, the terms of the directive may come into force directly, so that citizens are not denied the protection guaranteed to them by the directive.

To date, only five EU member states—Greece, Italy, Portugal, Sweden, and the United Kingdom—have enacted national laws to comply with the directive, although laws are pending in most other member states.<sup>89</sup> Most of the other

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87. *Id.*

88. *See id.*

89. THE SECOND ANNUAL REPORT OF THE EU WORKING PARTY ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA, adopted on November 30, 1998, summarized progress towards implementing the directive in national legislation in other member states as follows:

In Belgium, the Bill to transpose the directive, revised following the opinion of the Council of State, was submitted to Parliament in April 1998.

In Denmark, the Bill was submitted on 30 April 1998, and Parliament finished its first reading in June.

In Spain, the preliminary Bill amending current legislation on data protection (organic law 5/1992) was submitted to the Council of State for opinions and should be

member states are expected to have enacted laws transposing the directive by 2000, and it must be remembered that each of the member states which has not yet transposed the directive into national law nonetheless has an existing data protection law still in force.

In the five countries that have implemented the law to date, the newly adopted national data protection laws have included a number of provisions affecting both the substantive level of data protection in each country and the ease of complying with each country's laws, particularly with regard to transborder data flow. A quick survey of three of these laws provides a number of important examples.

Sweden's new Personal Data Protection Act, which was enacted on April 29,

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discussed by Parliament during summer 1998; however, most of the provisions have already been transposed by the "Ley Organica" 5/1992 of 29 October 1992 on the automatic processing of personal data

In Germany, . . . [t]he Ministry of Interior . . . submitted a bill on 1 December 1997, on which the Federal Data Protection Commissioner made comments on 30 January 1998. A new bill of 8 April 1998 has not been dealt with further because of the national election on 27 September 1998. Due to the constitutional principle of incontinuity of legislation, a new draft bill has to be submitted to the Parliament in the new legislative period. . . .

In France, a report was sent to the Prime Minister in March 1998 and will be followed by a new report on telematic networks. The French authority responsible for data protection, the Commission Nationale de l'Informatique et des Libertés (CNIL) will be consulted concerning the preliminary bill, which was not however available at the time of the drafting of this report.

In Ireland, the Justice Minister is responsible for legislation on data protection. The legislation necessary to apply the directive, which will include amendments to the law of 1988 on data protection, is being drafted. . . .

In Luxembourg, transposition of the directive into national law falls to the Ministry of Justice. A bill was drawn up in 1997, but was later withdrawn. A new bill will be examined by Parliament in September 1998.

The Netherlands government had announced its intention to replace the current law on data protection, in force since 1 July 1989, with an entirely new law on the same subject, in accordance with the provisions of the directive. On 16 February 1998, a bill was submitted to Parliament to that end. The relevant parliamentary subcommittee gave its opinion in June 1998, and the debate in plenary session is expected to take place before the end of this year.

The Austrian federal chancellery (Österreichisches Bundeskanzleramt) prepared a draft for transposition of the directive into national law, which was examined by the Council responsible for data protection; a revised version should be submitted to Parliament in autumn 1998. . . .

In Finland, an ad hoc committee responsible for the transposition of the directive (Henkilötietotoinikunta) completed its work in 1997. The bill was submitted to Parliament in July 1998. . . .

1998, and took effect on October 24, 1998, effectively abandons mandatory registration of data processing activities. After twenty-five years' experience with such a system—the longest in Europe—Sweden concluded that such registration was burdensome and unnecessary for effective protection of privacy rights. Instead, the new Swedish law allows data processors to avoid registration if they appoint a “personal data representative.” The personal data representative, usually a lawyer, “shall have the function of independently ensuring that the controller of personal data processes personal data in a lawful and correct manner and in accordance with good practice and also points out any inadequacies to him or her.”<sup>90</sup> The personal data representative must also help aggrieved data subjects seek resolution of their complaints with the data processor. Once the data processor has informed the supervisory authority of the name and address of its personal data representative, further recourse to the supervisory authority is necessary only if the personal data representative does not believe that the data processor is in compliance with the national law or cannot achieve successful resolution of a data subject’s complaint. This provision promises to streamline the process of complying with the national law and effectively eliminate registration with the national authority as a condition of processing personal data.

Similarly, Sweden has determined to allow “research ethics committees”—Institutional Review Boards in the United States—at hospitals and universities to handle *all* data protection functions related to data involved in the studies and protocols those IRBs approve.<sup>91</sup> The national supervisory authority will effectively have *no* role with regard to such data, other than its judicial role (i.e., hearing complaints), thereby avoiding having data protection issues addressed by two separate regulatory authorities—the supervisory authority and an IRB.

At the same time, while Sweden has reduced the burden of complying with its national data protection law, it has also shown that it is serious about data protection. For example, the Swedish data protection commissioner, Anitha Bondestam, has required American Airlines to obtain the “explicit consent” of Swedish passengers before recording information concerning their meal preferences or requests for wheelchairs or other assistance in American’s Sabre reservation system. Commissioner Bondestam reasoned that the data were especially sensitive because they could reveal health or religious information. American has lost two judicial appeals; the matter is now before the Swedish Supreme Court.<sup>92</sup>

Sweden’s new law also prohibits outright the processing of personal data “concerning legal offences involving crime, judgments in criminal cases, coercive penal procedural measures or administrative deprivation of liberty” by

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90. Swedish Personal Data Act (1998:204), art. 37.

91. *See id.* art. 19.

92. *See American Airlines v. Sabre. Kammarrätten i Stockholm* (Administrative Court of Appeals, Stockholm), Apr. 1997.

anyone other than a public authority.<sup>93</sup> However, the law exempts from this prohibition and most of its other substantive restrictions processing of personal data “exclusively for journalistic purposes or artistic or literary expression”—an exception that is far broader than that contained in the directive itself.<sup>94</sup>

Italy, by contrast, was a comparative latecomer to European-style data protection. However, in January 1997 Italy enacted a sweeping law implementing the directive—the Protection of Individuals and Legal Persons Regarding the Processing of Personal Data Act. This law, which took effect on May 8, 1997, defines “personal data” as “any information relating to natural or legal persons, bodies or associations that are or can be identified, even indirectly, by reference to any other information including by a personal identification number[.]”<sup>95</sup> This definition is broader than the directive’s, which only applies to natural persons, and clearly encompasses even encrypted or anonymized data that “can be identified, even indirectly, by reference to any other information[.]”<sup>96</sup>

The Italian law specifies that consent for the processing of sensitive data must be in writing and that such processing must be specially authorized by the national government’s supervisory authority which is a much broader restriction than that contained in the directive.<sup>97</sup> The law’s disfavor for the processing of such personal data is further reflected in the provision specifying that if the supervisory authority fails to respond within thirty days to a request for authorization to process sensitive data, the request “shall be considered to have been dismissed.”<sup>98</sup>

The Italian data protection law contains a stronger restriction on data export than that required by the directive. The law requires that the exporter notify the supervisory authority of any proposed transfer of data outside of EU member states, whether “temporarily or not, in any form, and by any means whatsoever,” not less than fifteen days before the proposed transfer. Where sensitive data are involved, the notification is required for transfer even to other EU member states and must take place at least twenty days before the proposed transfer.<sup>99</sup>

As in the directive, transfers are prohibited to countries which do not provide adequate data protection. However, for transfers involving sensitive data, the law requires that the protection must be “equal to that ensured by Italian laws.”<sup>100</sup> As a result, to transfer data revealing “racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, . . . [or] concerning health or sex life,” the transferor would have to demonstrate that the destination

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93. Swedish Personal Data Act, *supra* note 90, art. 21.

94. *Id.* art. 7.

95. Protection of Individuals and Legal Persons Regarding the Processing of Personal Data Act (1998), art. 1(2)(c) (It.).

96. *Id.* art.

97. See *id.* art. 21.

98. *Id.* art. 22(2).

99. See *id.* arts. 28(1)-(2).

100. *Id.* art. 28(3).

country offers *equivalent*, not merely adequate, data protection. This was the language originally considered, but later rejected as too stringent, for the EU directive.

The United Kingdom's new Data Protection Act,<sup>101</sup> which received the Royal Assent on July 16, 1998, but is not expected to be brought into effect by the government until at least April 1999, is perhaps the most different of the five national laws transposing the directive. While Sweden, Italy, Greece, and Portugal enacted laws largely mirroring the broad style and structure of the directive—often referred to as “framework” legislation, because of the need for subsequent legislation or regulations to provide necessary detail—the United Kingdom adopted a lengthy, extraordinarily detailed law that leaves few questions unaddressed. Running to more than 100 pages and including seventy-five articles and sixteen schedules (four times longer than any of the other national laws), the U.K. law includes detailed provisions on all of the subjects covered by the EU data protection directive, as well as jurisdictional issues, the administration of the new law, and the interaction of various government offices. The law even includes specific sections on direct marketing and credit reports, and detailed exemptions from specific sections of the law for “national security,” “crime and taxation,” “health, education and social work,” “regulatory activity,” “journalism, literature and art,” “research, history and statistics,” “information available to the public or under enactment,” “disclosures required by law or made in connection with legal proceedings etc.,” “domestic purposes,” and “miscellaneous exemptions;” the law empowers the Secretary of State to promulgate additional exemptions.<sup>102</sup>

The likely effect of this level of detail is not necessarily to change the level of protection afforded privacy, but rather to provide a statute that is difficult to understand without legal assistance, but that leaves fewer important matters to the discretion of the national supervisory authority.

As the examples of Sweden, Italy, and the United Kingdom suggest, the process of transposing the directive into national law introduces significant differences in the legal standards applicable to the processing of personal data in each member state. This is a far cry from the uniform data protection standards anticipated by the directive's proponents. These variations in protection are of comparatively minor concern to European data processors because the directive forbids outright one member state from interfering with the flow of personal data to another member state, no matter how much their national laws may differ. But the variety of national data protection standards heightens the concerns of non-European data processors, who anticipate having to comply separately with the national law of each member state from which they wish to export, or about whose citizens they process, personal data.

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101. Data Protection Act, 1998 (1998 Chapter 29) (UK).

102. *Id.* arts. 28-38.

## II. UNITED STATES

When compared with the omnibus, centralized data protection of the EU directive and member states' national laws, U.S. privacy protection stands in stark contrast and to some observers seems to pale altogether. The novelty and urgency of the recent surge of attention to privacy in the United States may appear to lend credence to this view. This section addresses the extent of privacy protection in the United States by first surveying the major legal protections for privacy, and then considering the principles that both undergird that protection and impose limits on it.

### *A. Constitutional Framework*

In the United States, there is no explicit constitutional guarantee of a right to privacy. The Supreme Court, however, has interpreted many of the amendments constituting the Bill of Rights to provide some protection to a variety of elements of individual privacy against intrusive government activities.<sup>103</sup>

None of these provisions refer to privacy explicitly, and the circumstances in which privacy rights are implicated are as widely varied as the constitutional sources of those rights. Moreover, it must be remembered that constitutional rights protect only against state action and are generally "negative" in nature.<sup>104</sup> As a result, any constitutional concept of "privacy" applies only against the government and at most requires that the government refrain from taking actions which impermissibly invade privacy.

1. *Expression, Association, and Religion.*—The Court has identified a number of privacy interests implicit in the First Amendment.<sup>105</sup> In *NAACP v. Alabama*,<sup>106</sup> the U.S. Supreme Court struck down an Alabama ordinance requiring the NAACP to disclose its membership lists, finding that such a requirement constituted an unconstitutional infringement on NAACP members' First Amendment right of association.<sup>107</sup> In *Breard v. City of Alexandria*,<sup>108</sup> the Court upheld an ordinance prohibiting solicitation of private residences without

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103. See CATE, *supra* note 19, at 49-66.

104. Only the Thirteenth Amendment, which prohibits slavery, applies to private parties. See *Clyatt v. United States*, 197 U.S. 207, 216-220 (1905). Although state action is usually found when the state acts toward a private person, the Supreme Court has also found state action when the state affords a legal right to one private party which impinges on the constitutional rights of another, see *New York Times Co. v. Sullivan*, 376 U.S. 264, 265 (1964), and in rare cases when a private party undertakes a traditionally public function, see *Marsh v. Alabama*, 326 U.S. 501 (1946), or when the activities of the state and a private entity are sufficiently intertwined to render the private parties' activities public, see *Evans v. Newtown*, 382 U.S. 296 (1966).

105. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble . . ." U.S. CONST. amend. I.

106. 357 U.S. 449 (1958).

107. See *id.* at 464-65.

108. 341 U.S. 622 (1951).

prior permission. The Court found in the First Amendment's free speech guarantee an implicit balance between "some householders' desire for privacy and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best results."<sup>109</sup> The Court has invoked this same implied balancing test in numerous other cases. In *Kovacs v. Cooper*,<sup>110</sup> the Court upheld a Trenton, New Jersey, ordinance prohibiting the use of sound trucks and loudspeakers:

The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loudspeakers except through the protection of the municipality.<sup>111</sup>

In *Rowan v. U.S. Post Office*,<sup>112</sup> the Court upheld a federal statute which permitted homeowners to specify that the Post Office not deliver to their homes "erotically arousing" and "sexually provocative" mail.<sup>113</sup> In *Federal Communications Commission v. Pacifica Foundation*,<sup>114</sup> the Court allowed the Federal Communications Commission to sanction a radio station for broadcasting "indecent" programming, finding that "the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."<sup>115</sup> In *Frisby v. Schultz*,<sup>116</sup> the Court upheld a Brookfield, Wisconsin statute that banned all residential picketing, writing that the home was "the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits"<sup>117</sup> and "the last citadel of the tired, the weary, and the sick."<sup>118</sup> In *Carey v. Brown*,<sup>119</sup> the Court wrote that "the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."<sup>120</sup>

Although the Court rarely specifies the source of these privacy rights, it treats them as values implicitly balanced with the First Amendment right to free

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109. *Id.* at 644.

110. 336 U.S. 77 (1949).

111. *Id.* at 86-87.

112. 397 U.S. 728 (1970).

113. *Id.* at 729-30.

114. 438 U.S. 726 (1978).

115. *Id.* at 748.

116. 487 U.S. 474 (1988).

117. *Id.* at 484 (quoting *Carey v. Brown*, 447 U.S. 455 (1980)).

118. *Id.* (quoting *Gregory v. City of Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

119. 447 U.S. 455 (1980). The Court in *Carey* struck down the Illinois ordinance at issue that prohibited residential picketing, on the grounds that the ordinance excluded labor picketing. See *id.* at 470.

120. *Id.* at 471.

expression. In *Stanley v. Georgia*,<sup>121</sup> however, the Court explicitly linked privacy and free expression by identifying the mutual interests that they serve. The Court overturned a conviction under Georgia law for possessing obscene material in the home. While the “States retain broad power to regulate obscenity,” Justice Marshall wrote for the unanimous Court, “that power simply does not extend to mere possession by the individual in the privacy of his own home.”<sup>122</sup> The Court based its decision squarely on the First Amendment, which the Court found included the “right to be free, except in very limited circumstances, from unwanted governmental intrusion into one’s privacy.”<sup>123</sup> The Court concluded: “If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”<sup>124</sup>

2. *Searches and Seizures*.—Most of the Supreme Court’s jurisprudence concerning a constitutional right to privacy has centered on the Fourth Amendment’s prohibition on unreasonable searches and seizures.<sup>125</sup> This prohibition reflects two deeply rooted concerns: that citizens’ property be protected from seizure by the government and that citizens’ homes and persons be protected from warrantless or arbitrary searches. These concerns are reflected in the Declaration of Independence and many of the colonial debates and writings, as well as in the Constitution. In 1886, the Supreme Court first applied the term “priva[cy]” to the interests protected by the Fourth Amendment.<sup>126</sup> Four years later, Supreme Court Justice Louis Brandeis joined forces with Samuel Warren to articulate “The Right to Privacy” in the *Harvard Law Review*.<sup>127</sup> Justice Brandeis boldly stated his views on privacy in his 1928 dissent in *Olmstead v. United States*.<sup>128</sup> Five of the nine justices had found that wiretapping of telephone wires by federal officials did not constitute a search or seizure because there had been no physical trespass and nothing tangible had been taken. Justice Brandeis wrote:

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121. 394 U.S. 557 (1969).

122. *Id.* at 568.

123. *Id.* at 564.

124. *Id.* at 565.

125. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

126. *Boyd v. United States*, 116 U.S. 616, 625-26 (1886).

127. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

128. 277 U.S. 438 (1928).

The protection guaranteed by the [Fourth and Fifth]<sup>129</sup> Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.<sup>130</sup>

Almost forty years later, the Court adopted Justice Brandeis' reasoning in *Katz v. United States*.<sup>131</sup> The case addressed the constitutionality of federal authorities' use of an electronic listening device attached to the outside of a telephone booth used by Charles Katz, who the authorities suspected of violating gambling laws. The Court found that this method of gathering evidence infringed on Katz' Fourth Amendment rights, even though his property had not been invaded.<sup>132</sup> The Court found that the Constitution protects whatever one "seeks to preserve as private, even in an area accessible to the public. . ."<sup>133</sup> In his concurrence, Justice Harlan introduced what was later to become the Court's test for what was "private" within the meaning of the Fourth Amendment.<sup>134</sup> Justice Harlan wrote that the protected zone of Fourth Amendment privacy was defined by the individual's "actual," subjective expectation of privacy, and the extent to which that expectation was "one that society was prepared to recognize as 'reasonable.'"<sup>135</sup> The Court adopted that test in 1968 and continues to apply it today, with somewhat uneven results.<sup>136</sup> The Court has found "reasonable" expectations of privacy in homes, businesses, sealed luggage and packages, and even drums of chemicals, but no "reasonable" expectations of privacy in bank records, voice or writing samples, phone numbers, conversations recorded by concealed microphones, and automobile passenger compartments, trunks, and

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129. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V.

130. *Olmstead*, 277 U.S. at 478-79 (Brandeis, J., concurring).

131. 389 U.S. 347 (1967).

132. *See id.* at 353.

133. *Id.* at 351.

134. *See id.* at 360-61 (Harlan, J., concurring).

135. *Id.* at 361 (Harlan, J., concurring).

136. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

glove boxes.<sup>137</sup>

3. *Fundamental Decision-making.*—The U.S. Supreme Court's most controversial constitutional right to privacy has developed within a series of cases involving decisionmaking about contraception, abortion, and other profoundly personal issues. In 1965, the Court decided in *Griswold v. Connecticut*<sup>138</sup> that an eighty-year-old Connecticut law forbidding the use of contraceptives violated the constitutional right to "marital privacy."<sup>139</sup> Justice Douglas, writing for the Court, offered a variety of constitutional loci for this right:

Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>140</sup>

But the Court could not specifically identify a constitutional basis for the right to marital privacy. Instead, Justice Douglas wrote that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."<sup>141</sup> It was in these "penumbras, formed by emanations" that the Court grounded this new right.<sup>142</sup>

Eight years later, the Court extended this privacy right in *Roe v. Wade*<sup>143</sup> to encompass "a woman's decision whether or not to terminate her pregnancy."<sup>144</sup> Rather than base that right, directly or indirectly, on one or more of the specific guarantees of the Bill of Rights, the Court looked instead to "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action. . . ."<sup>145</sup> Notwithstanding this broad foundation, however, the Court in *Roe*

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137. See Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1368-70 (1992).

138. 381 U.S. 479 (1965).

139. *Id.* at 485-86.

140. *Id.* at 484.

141. *Id.*

142. *Id.*

143. 410 U.S. 113 (1973).

144. *Id.* at 153.

145. *Id.* The Fourteenth Amendment provides, in relevant part: "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

found that the constitutional "guarantee of personal privacy" only includes "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . ."<sup>146</sup> The Court specified that those fundamental rights include activities concerning marriage, procreation, contraception, family relationships, and child rearing and education.<sup>147</sup> Government regulation of those activities "may be justified only by a 'compelling state interest,'" and they must be "narrowly drawn to express only the legitimate state interests at stake."<sup>148</sup>

Although the Supreme Court indicated that government intrusion into inherently private areas of personal life would be subject to strict scrutiny, the Court has limited the scope of what it considers "private." In 1988, in *Bowers v. Hardwick*,<sup>149</sup> the Court declined to extend the right of privacy to the interests of homosexuals to engage in sodomy within their homes. The following year, in *Webster v. Reproductive Health Services*,<sup>150</sup> the Court upheld a Missouri statute imposing significant limitations on performing abortions, including an outright ban on the use of public funds, employees, or facilities to perform abortions not necessary to save the mother's life or to counsel a woman to have such an abortion. Chief Justice Rehnquist, writing for a five-justice plurality of the Court, argued that the privacy interest at issue was merely "a liberty interest protected by the Due Process Clause" and not a "fundamental" constitutional right.<sup>151</sup> As Laurence Tribe has written, the reasoning in *Webster* suggests that a woman's "right" to an abortion is "apparently no different from her 'right' to drive a car, say, or open a store, or work as a dentist."<sup>152</sup>

4. *Nondisclosure*.—Although the Court has identified constitutional privacy interests in a variety of settings, the area most likely to be applicable to the interest of individuals in information privacy has arisen in a series of cases involving nondisclosure of sensitive information. In 1977, the Supreme Court decided *Whalen v. Roe*.<sup>153</sup> *Whalen* involved a challenge to a New York statute requiring that copies of prescriptions for certain drugs be provided to the state. The Court held that the requirement would infringe upon patients' privacy rights.<sup>154</sup> In his opinion for the unanimous Court, Justice Stevens wrote that the constitutionally protected "zone of privacy" included two separate interests: "the interest in independence in making certain kinds of important decisions" and "the individual interest in avoiding disclosure of personal matters . . ."<sup>155</sup> The first

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146. *Roe*, 410 U.S. at 152 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

147. See *id.* at 152-53.

148. *Id.* at 155.

149. 478 U.S. 186 (1986).

150. 492 U.S. 490 (1989) (plurality opinion).

151. *Id.* at 520.

152. LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 23 (1990).

153. 429 U.S. 589 (1977).

154. See *id.* at 603-04.

155. *Id.* at 599-600.

interest is clearly grounded in *Roe v. Wade*,<sup>156</sup> *Griswold v. Connecticut*,<sup>157</sup> and similar cases, to which Justice Stevens cited. The second interest appears to be a new creation of the *Whalen* Court, although based on the “Fourteenth Amendment’s concept of personal liberty” identified in *Roe*.<sup>158</sup> Nevertheless, having found this new privacy interest in nondisclosure of personal information, the Court did not apply strict scrutiny, apparently because the interest was not a right involving a “fundamental” interest. Instead, the court applied a lower level of scrutiny, and held that the statute did not infringe the individuals’ interest in nondisclosure.<sup>159</sup>

Likewise, federal appellate courts in the Second, Third, Fifth, and Ninth Circuits have reached similar results, finding a constitutional right of privacy in individuals not being compelled by the government to disclose personal information, particularly medical records.<sup>160</sup> However, by extending the right of nondisclosure beyond fundamental rights, these courts have applied a lower standard of scrutiny than that applicable in cases involving marriage, procreation, contraception, family relationships, and child rearing and education. Instead of strict scrutiny, these courts used intermediate scrutiny:

The government may seek and use information covered by the right to privacy if it can show that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest. The more sensitive the information, the stronger the state’s interest must be.<sup>161</sup>

Courts in the Fourth and Sixth Circuits, however, have severely limited the scope of the *Whalen* nondisclosure privacy right. In 1993, the Court of Appeals for the Fourth Circuit decided *Walls v. City of Petersburg*.<sup>162</sup> *Walls* involved a city employee’s claim that her dismissal for refusing to answer an official questionnaire violated her constitutional right to nondisclosure. The employee particularly objected to Question 40, which asked “Have you ever had sexual relations with a person of the same sex?”<sup>163</sup> The appellate court, while acknowledging that the “relevance of this question to Walls’ employment is uncertain,” nonetheless found that “Question 40 does not ask for information that

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156. 410 U.S. 113, 153 (1973).

157. 381 U.S. 479, 485-86 (1965).

158. *Whalen*, 429 U.S. at 598 n.23.

159. See *id.* at 603-04. The Court also explicitly rejected the application of the Fourth Amendment right of privacy, writing that Fourth Amendment cases “involve affirmative, unannounced, narrowly focused intrusions.” *Id.* at 604 n.32.

160. See *Doe v. Southeastern Pa. Transp. Auth.*, 72 F.3d 1133 (3d Cir. 1995); *Doe v. Attorney General*, 941 F.2d 780 (9th Cir. 1991); *Barry v. City of New York*, 712 F.2d 1554 (2d Cir. 1983); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980); *Schacter v. Whalen*, 581 F.2d 35, 37 (2d Cir. 1978); *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978).

161. *Doe*, 941 F.2d at 796 (citations omitted).

162. 895 F.2d 188 (4th Cir. 1990).

163. *Id.* at 190.

Walls has a right to keep private.”<sup>164</sup> The court reasoned that because the Supreme Court had found no fundamental right to *engage* in homosexual acts, there could be no constitutional right not to disclose such practices.<sup>165</sup> The Court of Appeals for the Sixth Circuit has similarly restricted the right not to disclose personal information to information concerning fundamental rights.<sup>166</sup>

### 5. *The Limits of Constitutional Protections for Privacy.*—

a. *First Amendment.*—While the Constitution affords substantial protection for personal privacy from invasion by the government, it affords effectively no protection for privacy from interference by private parties and it even restricts the government’s efforts to create statutory, regulatory, or common law tools for protecting privacy from non-governmental intrusion. In short, the Constitution is the source not only of privacy rights, but also of other significant rights against which all government efforts—treaty commitments, statutes, regulations, administrative and executive orders, and daily functions—must be measured. One of the most important of these rights, the one most often implicated by government efforts to protect privacy, and one of the most distinct products of U.S. history and culture, is the First Amendment restraint on government abridgement of freedom of expression or of the press.<sup>167</sup> Any effort by the government to protect privacy, whether through direct regulation or the creation or enforcement of legal causes of action among private parties, must be consonant with the First Amendment if that protection is to survive constitutional review.

This tension between the First Amendment as protecting privacy and as prohibiting the government from restricting expression in order to protect privacy runs throughout First Amendment jurisprudence. Ken Gormley has written that over time, “the First Amendment came to be viewed as possessing two distinct hemispheres.”<sup>168</sup> One was the traditional freedom to speak and associate without governmental interference. The other was “the less familiar freedom of the citizen to think and engage in private thoughts, free from the clutter and bombardment of outside speech.”<sup>169</sup> Neither yields any significant protection for privacy, beyond that already implicit in the First Amendment’s guarantees to speak, associate, and worship without governmental interference.

The association and expression cases clearly suggest the recognition of a constitutional right of privacy, in the sense of solitude or seclusion from intrusion, based on the First Amendment. That right is necessarily limited, however, to restricting the conduct of government and the government’s creation of legal rights that private parties might use to interfere with the privacy of others. Moreover, case law recognizing the right is relatively overshadowed by

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164. *Id.* at 193.

165. *See id.*

166. *See J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981) (disseminating juveniles’ social histories prepared by state probation officers does not violate privacy rights).

167. *See U.S. CONST. amend. I.*

168. Gormley, *supra* note 137, at 1381.

169. *Id.*

cases indicating that the right carries little weight when balanced against other, explicit constitutional rights, especially in situations involving activities outside of the private home. For instance, the Court has accorded privacy rights little protection when confronted with freedom of association claims of groups such as the American Communist Party.<sup>170</sup> The Court often has overturned ordinances restricting door-to-door solicitation with little if any comment on the privacy interests of the occupants.<sup>171</sup>

Similarly, the Court has often demonstrated little concern for the privacy interests of unwilling viewers or listeners, rejecting claims against broadcasts of radio programs in Washington, D.C. streetcars,<sup>172</sup> R-rated movies at a drive-in theater in Jacksonville, Florida,<sup>173</sup> and a jacket bearing an "unseemly expletive" worn in the corridors of the Los Angeles County Courthouse.<sup>174</sup> Moreover, plaintiffs rarely win suits brought against the press for disclosing private information. When information is true and obtained lawfully, the Supreme Court repeatedly has held that the state may not restrict its publication without a showing that the government's interest in doing so is "compelling" and that the restriction is no greater than is necessary to achieve that interest.<sup>175</sup> This is "strict scrutiny," the highest level of constitutional review available in the United States. Protection of privacy rarely constitutes a sufficiently compelling interest to survive strict scrutiny. Even if information published by the press is subsequently proved to be false, the Supreme Court has demonstrated extraordinary deference to the First Amendment expression rights of the press and little concern for the privacy interests involved.<sup>176</sup>

In fact, when privacy rights conflict with free expression rights before the Court, the latter prevail, virtually without exception. Under the Court's strict scrutiny requirement, it has struck down laws restricting the publication of confidential government reports,<sup>177</sup> and of the names of judges under investigation,<sup>178</sup> juvenile suspects,<sup>179</sup> and rape victims.<sup>180</sup> The dominance of the free expression interests over the privacy interests is so great that Peter Edelman

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170. See *Noto v. United States*, 367 U.S. 290 (1961); *Scales v. United States*, 367 U.S. 203 (1961); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961).

171. See, e.g., *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

172. See *Public Util. Comm'n v. Pollack*, 343 U.S. 451 (1952).

173. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

174. See *Cohen v. California*, 403 U.S. 15 (1971).

175. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Landmark Communications Inc. v. Virginia*, 435 U.S. 829 (1978); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

176. See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

177. See *New York Times Co. v. United States*, 403 U.S. 713 (1971).

178. See *Landmark Communications, Inc.*, 435 U.S. at 829.

179. See *Smith*, 443 U.S. at 97.

180. See *Florida Star*, 491 U.S. at 524; *Cox Broad. Corp.*, 420 U.S. at 469.

has written:

[T]he Court [has] virtually extinguished privacy plaintiffs' chances of recovery for injuries caused by truthful speech that violates their interest in nondisclosure. . . . If the right to publish private information collides with an individual's right not to have that information published, the Court consistently subordinates the privacy interest to the free speech concerns.<sup>181</sup>

This is true irrespective of whether the speaker is an individual or an institution. Even wholly commercial expression is protected by the First Amendment. The Court has found that such expression, if about lawful activity and not misleading, is protected from government intrusion unless the government can demonstrate a "substantial" public interest, and that the intrusion "directly advances" that interest and is "narrowly tailored to achieve the desired objective."<sup>182</sup> The Court does not characterize expression as "commercial," and therefore subject government regulations concerning it to this "intermediate scrutiny," just because it occurs in a commercial context. The speech of corporations is routinely accorded the highest First Amendment protection—"strict scrutiny" review—unless the Court finds that the purpose of the expression is to propose a commercial transaction<sup>183</sup> or that the expression occurs in the context of a regulated industry or market (such as the securities exchanges) and concerns activities which are, in fact, being regulated (the sale of securities).<sup>184</sup>

Any governmental effort to protect privacy from intrusion by non-governmental entities, either directly or through the passage or enforcement of laws permitting suits by private parties, faces significant First Amendment obstacles. This is particularly true when the privacy protection would apply to information concerning government activities and the qualifications and behavior of government officials, or would restrict access on the basis of the content of the material to be protected.

b. *Fifth Amendment*.—The Fifth Amendment to the U.S. Constitution prohibits the government from taking private property for public use without both due process of law and just compensation.<sup>185</sup> Historically, the Supreme Court has applied the "Takings Clause" to require compensation when the government physically appropriated real property, even if only a tiny portion of the property

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181. Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1198 (1990).

182. *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

183. See *Central Hudson*, 447 U.S. at 562.

184. See *Lowe v. Securities & Exch. Comm'n*, 472 U.S. 181 (1985).

185. "No person shall . . . be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

at issue was occupied<sup>186</sup> or if that occupation was only temporary.<sup>187</sup> Beginning in 1922, however, the Court has found a compensable taking even when the government does not engage in physical occupation<sup>188</sup> and when the property involved is not land or even tangible, corporeal property, but rather a legal entitlement,<sup>189</sup> government benefit,<sup>190</sup> or interest in continued employment.<sup>191</sup> In 1984, the Court decided *Ruckelshaus v. Monsanto Co.*,<sup>192</sup> which extended the Fifth Amendment's Takings Clause to protect stored data.

The Supreme Court's recognition of these "regulatory takings"—including takings of stored data—suggests that privacy regulations that substantially interfere with a private party's use of data that she has collected or processed, may require compensation under the Fifth Amendment. In *Ruckelshaus*, the Supreme Court found that the Environmental Protection Agency's use of plaintiff's proprietary research data constituted a compensable taking.<sup>193</sup> As in all regulatory takings cases, the Court in *Ruckelshaus* faced two fundamental questions: whether there was "property" and, if so, whether it was "taken" by the government's action.<sup>194</sup> The first question presented little difficulty because state law recognizes a property right in "trade secrets" and other confidential business information, and the possessors of such data have long been accorded property-like rights to control access to, and the use of, business information.<sup>195</sup> To answer the second question, the Court focused on Monsanto's "reasonable investment-backed expectation with respect to its control over the use and dissemination of the data,"<sup>196</sup> finding that Monsanto had invested substantial resources in creating the data and reasonably believed that they would not be disclosed by the EPA.

To be certain, not all regulations of private property constitute takings. Although the Court has put forward a number of tests for determining when a

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186. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (involving only 1.5 cubic feet of private property occupied).

187. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (ordering just compensation where plaintiff was denied use of its property for six years).

188. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (holding that state abrogated right to remove coal from property).

189. See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (holding that there was property interest in statutorily created cause of action for discrimination against the disabled); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (finding a property interest in common law contract rights).

190. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976) (holding that there exists a property interest in Social Security benefits).

191. See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972) (finding a property interest exists in continued employment).

192. 467 U.S. 986 (1984).

193. See *id.* at 1013.

194. See *id.* at 1000.

195. See *id.* at 1003.

196. *Id.* at 1011.

regulatory taking occurs, the common element in them all is that a taking occurs when the government's regulation "denies an owner economically viable use" of his property.<sup>197</sup> In the classic formulation of property rights as a bundle of sticks, a taking may exist where the government eliminates any one of those sticks, but a taking is certain to exist when the government effectively seizes the entire bundle by eliminating all of the sticks.

Even when a government regulation deprives a property owner of all use of his property, the Supreme Court has historically declined to find a taking, and therefore not required compensation, when the regulation merely abated a "noxious use" or "nuisance-like" conduct. Such a regulation does not constitute a taking of private property, because one never has a property right to harm others.<sup>198</sup> In 1992, however, the Supreme Court backed away from this "prevention of harmful use" exception, recognizing that the government could virtually always claim that it was regulating to prevent a harmful use.<sup>199</sup> Instead, the Court now requires that when a government regulation deprives property "of all economically beneficial use," the government must show that the power to promulgate the regulation inhered in the "background principles of the State's law of property and nuisance."<sup>200</sup> In other words, the Court seems to be asking if the property owner's expectations were reasonable in light of the government's recognized power and past practice.

Data protection regulation may legitimately prompt takings claims. If the government prohibits the processing of personal data, it could deny the owner all or most of the "economically viable use" use of that data. Moreover, if Congress were to enact privacy protection along the lines of the EU directive, that legislation might very well restrict all use of that data and thereby constitute a complete taking.<sup>201</sup> At first glance, this may seem an odd result, because the data collected or processed, in order to be subject to privacy regulation in the first place, must be about another person. How can one person have a constitutional property right to hold and use data about another? However, this result is not that surprising in light of current law in the United States, which rarely accords individuals ownership interests in key information about themselves. As Professor Branscomb has demonstrated in her study, *Who Owns Information?*, in the United States, telephone numbers, addresses, Social Security numbers, medical history, and similar personal identifying data are almost always owned

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197. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992); *see also* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Andrus v. Allard, 444 U.S. 51, 64 (1979).

198. *See* Jan G. Laitos, *The Takings Clause in America's Industrial States After Lucas*, 24 U. TOL. L. REV. 281, 288 (1993).

199. *See Lucas*, 505 U.S. at 1026.

200. *Id.* at 1027, 1029.

201. A legislature can effect a taking just as a regulatory agency can. *See, e.g., Agins*, 447 U.S. 255. Both are generally referred to as "regulatory takings," although the former is actually a "legislative taking." *See generally* Parking Ass'n of Ga., Inc. v. City of Atlanta, 515 U.S. 1116 (1995) (Thomas, J., dissenting from denial of cert.).

by someone else—the Post Office, the government, or a physician or hospital.<sup>202</sup> Moreover, individuals exercise few rights in data about themselves which are readily perceptible, such as gender, age, or skin color. A photographer who takes a picture on a public street has the legal right to use that picture for a wide variety of noncommercial and even commercial uses without the permission of the individuals depicted. In fact, those individuals have no legal right to market or even copy or publicly display the photograph which includes their images without the photographer's permission.<sup>203</sup>

A data processor exercises property rights in his data because of his investment in collecting and aggregating them with other useful data. It is this often substantial investment that is necessary to make data accessible and useful, as well as the data's content, that the law protects. In the current regulatory environment in the United States, discussed below, it is reasonable for an information processor to believe and to invest resources in the belief that she will be able, within some limits, to use the data she collects and processes. In fact, as Arthur Miller has argued, the "expand[ing] protection for commercial information reflects a growing awareness that the legal system's recognition of the property status of such information promotes socially useful behavior"<sup>204</sup> and therefore encourages reliance by data processors. A legislative, regulatory, or even judicial<sup>205</sup> determination that denies processors the right to use their data could very likely constitute a taking and require compensation. Data processors who acquire or process data after enactment of new privacy standards would be on notice and therefore less likely to succeed in claiming takings. But for the billions of data files currently possessed and used by U.S. individuals and institutions, a dramatic alteration in user rights makes a compelling case for the existence of a taking.

The determination of whether a government action constitutes a taking, of course, turns on the details of the specific action and property involved. It is sufficient here to note that the personal information held by others is likely the subject of property and related rights. Those rights are in almost every case possessed by the data processor, not the persons to whom the data pertain. And because these data are accorded property-like protection, they are subject to

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202. See ANNE WELLS BRANSCOMB, WHO OWNS INFORMATION? FROM PRIVACY TO PUBLIC ACCESS (1994).

203. See 17 U.S.C. §§ 101-106 (1994 & Supp. 1997).

204. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 469 (1991).

205. See Note, *Trade Secrets in Discovery: From First Amendment Disclosure to Fifth Amendment Protection*, 104 HARV. L. REV. 1330 (1991).

Courts are widely considered "state actors" for purposes of constitutional analysis, and the Supreme Court has recognized that the takings clause applies to the courts. In a 1967 concurrence, Justice Stewart asserted that the fourteenth amendment forbids a state to take property without compensation "no less through its courts than through its legislature."

*Id.* at 1336 (quoting *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring)).

being taken by government regulation, thereby triggering an obligation to compensate the data owner.

Government efforts to protect privacy would have to clear considerable constitutional hurdles, including the First and Fifth Amendments.

6. *State Constitutions.*—At least eight states have adopted explicit constitutional guarantees of personal privacy. As with federal constitutional protections, these rights virtually always impose restrictions only on governmental activities. Often these protections are vague and aspirational. Moreover, when state constitutional rights and federal law conflict, federal law prevails. Therefore, state constitutional privacy rights have thus far been of little significance in the day-to-day protection of personal privacy. Nonetheless, these provisions are significant to the extent that they restrict the activities of state governments, serve as a potential source of future restraints on government activities, and indicate a growing interest in privacy protection.

Some state constitutional privacy protections merely repeat federal constitutional provisions. For example, Minnesota includes in its constitution the text of the Fourth Amendment to the Federal Constitution.<sup>206</sup> The constitutions of Hawaii and Louisiana both include Fourth Amendment-like provisions, but they have been modified to explicitly prohibit “invasions of privacy. . . .”<sup>207</sup> Some state constitutional protections for privacy incorporate exceptions as broad as the protection they purport to afford privacy. Arizona’s constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”<sup>208</sup> Such a right presumably would exist even without this constitutional provision. In 1980, Florida amended its constitution to provide that: “Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.”<sup>209</sup>

Other states’ provisions are less qualified or more specific. Alaska amended its constitution in 1972 to provide that “[t]he right of the people to privacy is recognized and shall not be infringed.”<sup>210</sup> In 1974, California added privacy to the “inalienable rights” protected under its constitution: “All people . . . have inalienable rights. Among these are . . . pursuing and obtaining . . . privacy.”<sup>211</sup> This provision is particularly noteworthy, because in 1994 the California Supreme Court found that it was applicable to private, as well as governmental, actions.<sup>212</sup> The Illinois constitution provides that “[t]he people shall have the right to be secure . . . against . . . invasions of privacy.”<sup>213</sup> In 1978, Hawaii

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206. See MINN. CONST. art. I, § 10.

207. HAW. CONST. art. I, § 7; LA. CONST. art. I, § 5.

208. ARIZ. CONST. art. II, § 8.

209. FLA. CONST. art. I, § 23.

210. ALASKA CONST. art. I, § 22.

211. CAL. CONST. art. I, § 1.

212. See *Hill v. National Collegiate Athletic Ass’n*, 865 P.2d 633 (Cal. 1994) (en banc).

213. ILL. CONST. art. 1, § 6.

amended its constitution to add: “The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.”<sup>214</sup> This is the most specific and protective of any of the state constitutional provisions guarding privacy interests, in practice as well as on paper. At least partially based on this provision, a Hawaiian court ruled in December 1996 in favor of same-sex marriages.<sup>215</sup>

Even the most protective state constitutional provisions, however, have yielded little protection for information privacy. For example, even in the 1994 case in which the California Supreme Court extended the state constitutional right to privacy to private actions, the Court found that a mandatory drug-testing program for college athletes did not violate that right.<sup>216</sup> This same result was reached by the U.S. Supreme Court the following year without the benefit of an explicit constitutional guarantee to privacy.<sup>217</sup> Moreover, in the context of global information networks and national and multinational information users, state protection is of limited significance.

### B. Federal Statutes

The laws and regulations governing the use of personal information are many and varied, but as a rule they each address a specific government agency, industry, or economic sector and often only specific issues. Even when legal protection is at its height, it is still often limited to certain activities, such as disclosure of personal data, and qualified by exemptions.<sup>218</sup>

Privacy-based controls on the *government's* collection and use of data are far more extensive than those applicable to non-governmental organizations. For example, the federal Privacy Act obligates government agencies to (1) store only relevant and necessary personal information; (2) collect information to the extent possible for the data subject; (3) maintain records with accuracy and completeness; and (4) establish administrative and technical safeguards to protect the security of records.<sup>219</sup> The Privacy Act also limits disclosure of individuals' records.<sup>220</sup> However, the Act explicitly restricts its provisions from prohibiting the release of any material for which disclosure is required under the Freedom of Information Act (FOIA).<sup>221</sup> The FOIA permits “any person” to obtain access to all federal “agency records,” subject to nine enumerated exemptions.<sup>222</sup> In

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214. HAW. CONST. art. 1, § 6.

215. See Lyle Denniston, *Judge OKs Same-Sex Marriages*, BALTIMORE SUN, Dec. 4, 1996, available in 1996 WL 6649965.

216. See Hill, 865 P.2d at 669.

217. See Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995).

218. See generally CATE, *supra* note 19, at 76-89.

219. See 5 U.S.C. §§ 552a(e)(1)-(5) (1994).

220. See *id.* § 552a(b).

221. See *id.* § 552a(t)(2).

222. See 5 U.S.C. § 552 (1994). Two of the nine exemptions are designed to protect privacy: Exemption 6 precludes disclosure of “personnel and medical files and similar files the disclosure

other words, any information to which the FOIA applies and which is not within one of the FOIA's nine enumerated exemptions, must be disclosed irrespective of the Privacy Act. In addition, the Privacy Act provides twelve exemptions that permit disclosure of information to other government agencies.<sup>223</sup> For example, the Act does not apply to Congress. It does not restrict disclosures to law enforcement agencies, and, under the broadest exemption, the Act does not apply to data requested by another government agency for "routine use."<sup>224</sup>

There are many other statutes and regulations which protect the privacy of citizen information from government disclosure of data. For example, federal law prohibits the Department of Health and Human Services from disclosing social security records, but permits all disclosures "otherwise provided by Federal law" or regulation.<sup>225</sup> Similarly, federal law prohibits the Internal Revenue Service from disclosing information on income tax returns<sup>226</sup> and the Census Bureau from disclosing certain categories of census data.<sup>227</sup> Finally, many states have adopted laws and regulations that mirror their federal counterparts.

Congress has also enacted a variety of laws addressing the protection of personal information in *private* industry sectors, such as in the context of financial transactions. The Fair Credit Reporting Act of 1970<sup>228</sup> (the "Act") "sets forth rights for individuals and responsibilities for consumer credit reporting agencies in connection with the preparation and dissemination of personal information in a consumer report bearing on the individual's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living."<sup>229</sup> The Act requires that credit reporting agencies follow "reasonable procedures to assure maximum possible accuracy"<sup>230</sup> of the information in their credit reports and implement a dispute resolution process to investigate and correct errors.<sup>231</sup> Agencies also must inform consumers about whom adverse decisions on credit, employment, or insurance are made based on a consumer report, of the use and source of the report. The

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of which would constitute a clearly unwarranted invasion of personal privacy," and Exemption 7(C) bans release of "records or information compiled for law enforcement purposes [which] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.* § 552(b)(6)-(7)(C). Many states have government disclosure statutes with privacy-based exemptions similar to those provided in the FOIA.

223. See *id.* § 552(a)(b)(1)-(12).

224. *Id.* § 552(a)(b)(3).

225. 42 U.S.C. § 1305 (1994).

226. See 26 U.S.C. §§ 6103, 7431 (1994 & Supp. 1997).

227. See 13 U.S.C. §§ 8-9 (1994 & Supp. 1997).

228. 15 U.S.C. §§ 1681-1681t (1994).

229. Joel R. Reidenberg, *Privacy in the Information Economy: A Fortress or Frontier for Individual Rights?*, 44 FED. COMM. L.J. 195, 210 (1992).

230. 15 U.S.C. § 1681e(b).

231. See *id.* § 1681i.

agencies must provide consumers with a copy of their reports upon request.<sup>232</sup>

Prior to being amended at the end of 1996, the Act's protections were weakened by a series of broad loopholes. On September 30, 1996, Congress passed the Consumer Credit Reporting Reform Act,<sup>233</sup> which closed many of these loopholes and significantly strengthened the protection for information privacy provided by the Fair Credit Reporting Act. For example, the Reform Act narrowed the broad "legitimate business need" purpose for which credit reports could be disseminated without the consumer's authorization to permit the distribution of credit reports only for a "legitimate business need . . . in connection with a business transaction that is initiated by the consumer" or "to review an account to determine whether the consumer continues to meet the terms of the account."<sup>234</sup> Consumer credit reports may now be furnished for employment purposes only if the employer certifies that the employee has consented.<sup>235</sup> Medical information may no longer be included in a credit report furnished in connection with employment, credit, insurance, or direct marketing, without the consent of the consumer.<sup>236</sup> If a credit reporting agency furnishes consumer credit information to be used for marketing credit or insurance opportunities to consumers, the agency must establish and publish a toll-free telephone number that consumers can call to have their names removed from lists provided for such direct marketing purposes.<sup>237</sup> Persons who acquire such information from credit reporting agencies for marketing credit and insurance services must inform consumers that credit information was used, identify the credit agency from which the data were obtained, and provide information about consumers' legal rights.<sup>238</sup>

The Act prohibits the dissemination of certain types of obsolete information, such as bankruptcy adjudications more than ten years prior to the report, suits and judgments older than seven years, paid tax liens older than seven years, and any other adverse information older than seven years.<sup>239</sup> Prior to the 1996 amendments, the Act permitted even obsolete information to be disseminated if requested in connection with an employment application for a position with a salary over \$20,000, a credit transaction over \$50,000, or the underwriting of life insurance over \$50,000.<sup>240</sup> Although these dollar thresholds were set in 1970, they had not been increased in twenty-five years to keep pace with inflation.<sup>241</sup>

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232. See *id.* § 1681m.

233. *Id.* §§ 1681-1681t (Supp. 1997).

234. *Id.*

235. See *id.*; see also Consumer Reporting Employment Clarification Act of 1998, Pub. L. No. 105-347, 112 Stat. 3208.

236. See 15 U.S.C. §§ 1681-1681t.

237. See *id.* § 1681b(c)(5).

238. See *id.* § 1681m(d).

239. See *id.* § 1681c(a); see also Consumer Reporting Employment Clarification Act of 1998, Pub. L. No. 105-347, 112 Stat. 3208.

240. See 15 U.S.C. § 1681c(b) (1994).

241. See Reidenberg, *supra* note 229, at 213 n.92.

The 1996 Reform Act continued to permit the dissemination of obsolete information, but it raised the dollar thresholds to permit dissemination in connection with an employment application for a position with a salary over \$75,000, a credit transaction over \$150,000, or the underwriting of life insurance over \$150,000.<sup>242</sup>

The revised act specifies a number of situations in which credit agencies and, in some cases, the persons to whom they supply information, must provide information to consumers, including a general requirement that agencies inform consumers of their legal rights under the Fair Credit Reporting Act.<sup>243</sup> In a dramatic extension of the law, the Reform Act provides that credit reporting agencies must delete any disputed data that they cannot verify within thirty days, as well as comply with a variety of new procedural requirements concerning correcting data and notifying recipients of credit reports of disputed or inaccurate data.<sup>244</sup> No longer must the consumer prove information false to have it excluded. In a second significant development, the Act now requires anyone who furnishes data to a credit reporting agency to correct inaccurate data, to notify any agency to which it has reported data if it determines that those data are inaccurate, and to disclose to any agency to which it is reporting data if those data's accuracy is disputed.<sup>245</sup> Finally, the Reform Act directed the Federal Reserve Board to make recommendations to Congress within six months concerning the data processing activities of organizations not covered by the Fair Credit Reporting Act and the extent to which those activities "create undue potential for fraud and risk of loss to insured depository institutions. . . ."<sup>246</sup>

After passage of the Reform Act's amendments, the Fair Credit Reporting Act significantly restricts the content, disclosure, and use of credit information, while not addressing the collection and use of personal information generally.<sup>247</sup>

Other statutes provide protection for certain specific privacy-related interests. For example, the Fair Credit Billing Act of 1974,<sup>248</sup> requires that creditors furnish consumers with copies of their credit transaction records and provide consumers with an opportunity to dispute errors, during which time creditors are restricted from disclosing information about delinquent payments.<sup>249</sup> The Fair Debt Collection Practices Act of 1977<sup>250</sup> limits debt collectors' disclosures to some

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242. See Department of Defense Appropriations Act, § 2406(a)(2) (codified at 15 U.S.C. § 1681c(b) (Supp. 1997)).

243. See 15 U.S.C. § 1681g(a), (c) (Supp. 1997).

244. See *id.* § 1681i(a).

245. See *id.* § 16815-2.

246. *Id.* § 2422. See BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, REPORT TO THE CONGRESS CONCERNING THE AVAILABILITY OF CONSUMER IDENTIFYING INFORMATION AND FINANCIAL FRAUD (1997) [hereinafter REPORT TO THE CONGRESS].

247. See 15 U.S.C. §§ 1681a(f), (d) (1994 & Supp. 1997).

248. *Id.* § 1666 (1994).

249. See Reidenberg, *supra* note 229, at 213.

250. 15 U.S.C. § 1692c(b) (1994).

third parties (but not credit reporting agencies) of a debtor's financial situation.<sup>251</sup>

The Electronic Communications Privacy Act of 1986<sup>252</sup> prohibits the interception or disclosure of the contents of any electronic communication, such as telephone conversations or e-mail, or even of any conversation in which the participants exhibit "an expectation that such communication is not subject to interception under circumstances justifying such an expectation."<sup>253</sup> There are a number of exceptions to this apparently broad privacy right, the most significant of which is that the prohibition does not apply if any one party to the communication consents to disclosure.<sup>254</sup> The prohibition also does not apply to switchboard operators, employees of telecommunications service providers, employees of the Federal Communications Commission, or anyone assisting the holder of a warrant, provided they are acting within the scope of their duties.<sup>255</sup> The prohibition also does not apply if the communication intercepted was "made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public," including any marine or aeronautical system, amateur and citizens band radio, or "general mobile radio services."<sup>256</sup>

Prior to 1996, there was no statutory protection for information about telecommunications transactions, such as telephone numbers or time, place, and duration of call.<sup>257</sup> The Electronic Communications Privacy Act did not apply to "transactional" information, so service providers faced no legal limits on collecting, storing, or disclosing such data. In fact, the statute explicitly authorizes the use of "a pen register or a trap and trace device" to record information about other individuals' conversations or transmissions.<sup>258</sup> On February 1, 1996, however, Congress passed the Telecommunications Act of 1996, which included provisions protecting the privacy of "Customer Proprietary Network Information"<sup>259</sup> ("CPNI"). The Act defines CPNI as "information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the

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251. *See id.*

252. 18 U.S.C. §§ 2510-2520 (1994 & Supp. 1997).

253. *Id.* §§ 2510-11(2) (1994).

254. *See id.* § 2511(2)(c).

255. *See id.* § 2511(2).

256. *Id.* § 2511(2)(g).

257. The Federal Communications Commission regulated the disclosure of such information as a way of promoting competition among telephone companies. *See* 47 C.F.R. § 64.702(d)(3) (1997). Under the Commission's regulations, a regulated telecommunications service provider could not provide information about telecommunications transactions to its own subsidiaries which offered "enhanced" services, unless it also disclosed that information to competitors. *See id.* *See generally* Fred H. Cate, *Privacy and Telecommunications*, 33 WAKE FOREST L. REV. 1, 37-41 (1998).

258. 18 U.S.C. § 2511(2)(h)(i) (1994).

259. Pub. L. No. 104-104, 11 Stat. 56 § 702 (codified at 47 U.S.C. § 222 (Supp. 1996)).

customer solely by virtue of the carrier-customer relationship.”<sup>260</sup> Under the Act, service providers may “use, disclose, or permit access to individually identifiable” CPNI only as necessary to provide the telecommunications service from which the information is derived or services necessary to that telecommunications service.<sup>261</sup> Service providers are free to use CPNI as necessary to protect their own business interests.<sup>262</sup> Although the Act only restricts the disclosure of information and the exemption for related services such as telephone directories is considerable, the new provision reflects Congress’ growing attention to privacy concerns.

The Cable Communications Policy Act of 1984<sup>263</sup> provides extensive privacy-related regulation of cable television service providers. The Act restricts the collection, storage, and disclosure of “personally identifiable information” without the subscriber’s consent,<sup>264</sup> and requires that service providers provide their subscribers with access to information collected about them.<sup>265</sup> The Act also requires that the cable service provider inform the customer at least once a year of the information it collects, the “nature, frequency, and purpose of any disclosure” of that information, the duration of its storage, the times and places at which a customer may have access to that information, and the terms of the statute.<sup>266</sup> The Act provides for statutory damages against cable operators who violate their customers’ rights under the Act.<sup>267</sup> It also includes some exemptions, particularly for disclosures of information “necessary to render, or conduct a legitimate business activity related to” the provision of cable service,<sup>268</sup> but it nonetheless constitutes the broadest set of privacy rights in any federal statute.

Federal law also protects against the disclosure of video tape rental and sale records. The Video Privacy Protection Act of 1988,<sup>269</sup> adopted in response to congressional outrage over the disclosure of the list of videos rented by Judge Robert Bork during his ill-fated Supreme Court nomination confirmation hearings, prohibits the disclosure of titles of particular films rented by identifiable customers. The statute also requires the destruction of personally identifiable information not later than one year after the information if no longer necessary for the purpose for which it was collected.<sup>270</sup> There are significant exemptions, for example, “if the disclosure is incident [sic] to the ordinary course

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260. *Id.* (codified at 47 U.S.C. § 222(f)(1)).

261. *Id.* (codified at 47 U.S.C. § 222(c)(1)).

262. *See id.* (codified at 47 U.S.C. § 222(d)).

263. 47 U.S.C. § 551(a)(1) (1994).

264. *Id.* § 551(c).

265. *See id.* § 551(d).

266. *Id.* § 551(a).

267. *See id.* § 551(f).

268. *Id.* § 551(c)(2).

269. 18 U.S.C. § 2710 (1994).

270. *See id.* § 2710(e).

of business of the video tape service provider. . . ."<sup>271</sup> Moreover, data about user viewing habits may be disclosed for marketing purposes if the user has been given an opportunity to "opt out" of such disclosure.<sup>272</sup> As a result, lists are widely available containing information on user viewing habits and other demographic information, such as median age and income.

Congress' most recent privacy law, the Children's Online Privacy Protection Act,<sup>273</sup> restricts the online collection of information about children under 13. The Act requires that operators of commercial web sites which target children or are aware that they are collecting information from children provide notice of their data collection policies and seek parental consent before collecting information from children.<sup>274</sup> The Act defers to the Federal Trade Commission most of the keys issues about the form and substance of parental notification and consent. The Commission adopted implementing regulations on October 20, 1999, which will take effect on April 21, 2000.<sup>275</sup> The Act also features a "safe harbor" option which allows industry groups to submit self-regulatory mechanisms to the Commission which, if approved would create a presumption that persons in compliance with these self-regulatory mechanisms are also in compliance with the Act.<sup>276</sup>

### C. State Statutes

At least thirteen states have general privacy statutes applicable to government activities. Some states also have statutory privacy rights that apply to the private sector. We can see three approaches reflected in these state statutory provisions.<sup>277</sup>

Two states, Massachusetts and Wisconsin, have adopted general rights of privacy, although these statutes largely restate the common law privacy torts which are discussed below. For example, Massachusetts provides that "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy,"<sup>278</sup> but state courts largely limit this right to the "public disclosure of private facts" tort discussed below. Similarly, Wisconsin's facially broad privacy statute—"The right of privacy is recognized in this state"<sup>279</sup>—is restricted to the torts of intrusion, public disclosure of private facts, and misappropriation.<sup>280</sup> Even in those limited contexts, the statute specifically

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271. *Id.* § 2710(b)(2)(E).

272. *See id.* § 2710(b)(2)(D).

273. Children's Online Privacy Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (to be codified at 15 U.S.C. § 6501).

274. *See id.*

275. *See id.*

276. *See id.*

277. *See Reidenberg, supra* note 229, at 227-28.

278. MASS. GEN. LAWS ANN. ch. 214, § 1B (1996) (West 1989).

279. WIS. STAT. ANN. § 895.50 (West 1998).

280. *See id.*

exempts from any prior restraint designed to protect privacy "constitutionally protected communication privately and through the public media. . . ."<sup>281</sup>

A number of states have eschewed the appearance of broad privacy protection and have instead codified one or more of the common law privacy torts (discussed below).<sup>282</sup> Finally, many states have enacted industry-specific privacy legislation in areas similar to federal private sector statutes.<sup>283</sup> These sectoral statutes have been the focus of recent intense state legislative activity, with forty-two states enacting a total of 786 bills in 1998.<sup>284</sup> Already in 1999, states have considered an extraordinary array of privacy statutes addressing issues ranging from direct marketing to medical records. New York has adopted fourteen new privacy laws and is still considering others.<sup>285</sup> Like their federal counterparts, "each state law generally seeks to resolve a narrow problem within a given industry and does not systematically address all the privacy concerns relating to the acquisition, storage, transmission, use and disclosure of personal information."<sup>286</sup> The new array of state statutes is also focusing new attention on issues surrounding the interaction of these laws with each other and with federal law, especially in the context of the Internet and electronic information transfers.

#### D. Tort Law

Following publication of Samuel Warren's and Louis Brandeis' article, "The

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281. *Id.* § 895.50(1)(a).

282. See, e.g., CAL. CIV. CODE § 3344 (West 1997); FLA. STAT. ANN. § 540.08 (West Supp. 1999); N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1992 & Supp. 1999).

283. See, e.g., CAL. LAB. CODE § 1198.5 (West Supp. 1999) (employee personnel records); CONN. GEN. STAT. ANN. § 31-128f (West 1997) (employee personnel records); DEL. CODE ANN. tit. 11, §§ 1335-36 (1995) (intrastate telephone service); MASS. GEN. LAWS ANN. ch. 93, §§ 50-68 (West 1997) (credit reporting); N.J. STAT. ANN. § 48:5A-54 to -63 (West 1998) (cable subscriber information and viewing habits); N.Y. GEN. BUS. LAW § 380 (McKinney 1996) (credit reporting); 18 PA. CONS. STAT. ANN. §§ 5701-775 (West 1983 & Supp. 1999) (intrastate telephone service).

284. See *Privacy Legislation in the States*, PRIV. & AM. BUS., Nov./Dec. 1998, at 1, 3.

285. See A.B. 7047, 222nd Legis., 1st Reg. Sess. (N.Y. 1999) (identify theft); A.B. 5543, 222nd Legis., 1st Reg. Sess. (N.Y. 1999) (temporary state privacy commission); A.B. 137, 222nd Legis., 1st Reg. Sess. (N.Y. 1999) (limits credit card and debit card issuers' release of customer names); A.B. 467, 222nd Legis., 1st Reg. Sess. (N.Y. 1999) (regulates personal identification of a credit card holders); A.B. 5384, 222nd Legis., 1st Reg. Sess. (N.Y. 1999) (credit card fraud prevention); A.B. 5917, 222nd Legis., 1st Reg. Sess. (N.Y. 1999) (telemarketing and unsolicited advertisements); A.B. 8110, 222nd Legis., 1st Reg. Sess. (N.Y. 1999) (limits use of registration lists and title information made available to contracting parties); AB. 8116, 222nd Legis., 1st Reg. Sess. (N.Y. 1999) (prohibits the disclosure of photos by state agencies); A.B. 1830, 222nd Legis., 1st Reg. Sess. (N.Y. 1999) (confidentiality of electronic toll records); A.B. 7044, 222nd Legis., 1st Reg. Sess. (N.Y. 1999) (privacy of e-mail addresses); A.B. 7045, 222nd Legis., 1st Reg. Sess. (N.Y. 1999) (unsolicited e-mail advertisements); A.B. 8130, 222nd Legis., 1st Reg. Sess. (N.Y. 1999) (Internet privacy).

286. Reidenberg, *supra* note 229, at 229.

Right to Privacy" in the *Harvard Law Review* in 1890,<sup>287</sup> seventy years passed before William Prosser proposed a structure for the common law privacy rights that Warren and Brandeis advocated.<sup>288</sup> Dean Prosser analyzed the numerous state court opinions recognizing various forms of a "right to privacy," and then categorized that right into four distinct torts: physical intrusion, misappropriation, false light, and publication of private facts.<sup>289</sup> This structure, included in the *Restatement (Second) of Torts* (for which Dean Prosser served as reporter), replaced the single privacy right found in the first *Restatement of Torts*. The second *Restatement* provides:

#### Section 652A. General Principle

- (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
- (2) The right of privacy is invaded by
  - (a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or
  - (b) appropriation of the other's name or likeness, as stated in § 652C; or
  - (c) unreasonable publicity given to the other's private life, as stated in § 652D; or
  - (d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.<sup>290</sup>

The tort of unreasonable intrusion lends little support to information privacy, other than as a potential restriction on the means of gathering information. Like the other three privacy torts, this one requires that the intrusion involve "solitude or seclusion of another or his private affairs or concerns" and that it be "highly offensive to a reasonable person."<sup>291</sup> This tort is recognized in some form in all but six states.

The tort of appropriation only applies to the "name or likeness" of an individual,<sup>292</sup> and therefore is of limited value as a protection for information privacy. Only about two-thirds of the states recognize this tort and most of them require that the appropriation be for "commercial gain," such as advertising.

The tort of "unreasonable publicity given to the other's private life" applies

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287. Warren & Brandeis, *supra* note 127.

288. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

289. *See id.* at 389.

290. RESTATEMENT (SECOND) OF TORTS § 652A (1976).

291. *Id.* § 652B.

292. *Id.* § 652C.

only when there is a disclosure to a large audience of private information that would be "highly offensive to a reasonable person and is not of legitimate concern to the public."<sup>293</sup> In addition to these limits, the U.S. Supreme Court has ruled that lawfully obtained, truthful information on a matter of public significance can never be the subject of legal liability, at least not without satisfying the requirements of strict scrutiny.<sup>294</sup> In *Philadelphia Newspapers, Inc. v. Hepps*,<sup>295</sup> the Court reaffirmed that punishing true speech was "antithetical to the First Amendment's protection. . . ."<sup>296</sup> Susan M. Gilles has noted that "[i]f the constitutional requirement of proof of falsity articulated in libel cases is extended to privacy cases, then the private-facts tort is unconstitutional."<sup>297</sup> This tort is recognized in all but six states, but the number of successful public disclosure actions has been insignificant.<sup>298</sup>

The final privacy tort is "publicity that unreasonably places the other in a false light before the public."<sup>299</sup> To be actionable under the false light tort, the publication must be both false and highly offensive to a reasonable person.<sup>300</sup> In 1967, in *Time, Inc. v. Hill*,<sup>301</sup> the Supreme Court extended the First Amendment privileges previously recognized in the context of defamation to actions for false light privacy.<sup>302</sup> The Court thus required plaintiffs to show that the defendant knew the publication was false or recklessly disregarded its truth or falsity.<sup>303</sup> Fewer than two-thirds of states recognize this tort.

These state tort actions are the principal source today of adjudicated legal rights concerning privacy. However, they offer little protection for information privacy. Even in their limited areas, only one award to a privacy tort plaintiff has ever survived the Supreme Court's First Amendment scrutiny.<sup>304</sup>

#### *E. U.S. Privacy Principles*

Privacy protection in the United States reflects four features of American society and system of government. Understanding those four features is critical to recognizing both the level of privacy protection that exists in the United States

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293. *Id.* § 652D. See also *id.* § 652D cmt. a.

294. See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

295. 475 U.S. 767 (1986) (holding a private-figure defamation plaintiff could not recover damages without also showing that the statements at issue were false).

296. *Id.* at 777.

297. Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1, 8 (1995).

298. See RESTATEMENT (SECOND) OF TORTS § 652E (1976).

299. *Id.*

300. See *id.*

301. 385 U.S. 374 (1967).

302. See *id.* at 387-88.

303. See *id.*

304. See *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245 (1974).

and the limits on that protection and on the means by which it may be achieved.

1. *Rights Against the Government*.—First, the U.S. Constitution reflects the conviction that the greatest threat to individual liberty is the government. As a result, rights articulated in the Constitution generally are protected only against government actions. Only the Thirteenth Amendment, which prohibits slavery, applies directly to private parties.<sup>305</sup> All other constitutional rights—whether to speak freely, confront accusers, or be tried by a jury of one's peers—regulate the public, but not the private, sector.

One dominant theme of constitutional rights is the protection of citizens from government intrusion into their privacy. A vigorous First Amendment, as we have seen, permits individuals the privacy of their own thoughts, beliefs, and associations.<sup>306</sup> The Third Amendment keeps government soldiers from being quartered in private homes.<sup>307</sup> The Fourth Amendment prohibits unreasonable searches and seizures.<sup>308</sup> The Fifth Amendment restricts government from interfering with private property, provides for due process and compensation when it does so, and protects citizens from self-incrimination.<sup>309</sup> Collectively, these and other provisions of the Constitution impose extraordinary limits on government authority to intrude on private property, compel testimony, or interfere with practices closely related to individual beliefs, such as protest, marriage, family planning, or worship.

Controlling a government's actions is an essential step to protecting privacy not only because of a government's size and power, but also because of its isolation from the market—a mechanism, as is discussed in greater detail below, that plays a vital role in protecting individuals from private-sector intrusion.

The effect of these constitutional protections, however, is not just to protect privacy from government intrusion. Legal respect for private property, for example, also allows individuals to separate themselves from each other, perhaps the best guarantee of privacy. The laws that attend private property are what empower one person to exclude another from her land, home, papers, and possessions, and to call upon the state to protect those objects from physical intrusion and interference.

2. *Importance of Open Information Flows*.—The second feature of the U.S. information society is the extraordinary importance placed in the United States on the unrestricted flow of information. As the Federal Reserve Board noted in its report to Congress on data protection in financial institutions, “it is the freedom to speak, supported by the availability of information and the free-flow of data, that is the cornerstone of a democratic society and market economy.”<sup>310</sup>

The significance of open data flows is reflected in the constitutional provisions not only for freedom of expression, but for copyrights, to promote the

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305. See *Clyatt v. United States*, 197 U.S. 207, 216-220 (1905).

306. See U.S. CONST. amend. I.

307. See *id.* amend. III.

308. See *id.* amend. IV.

309. See *id.* amend. V.

310. REPORT TO THE CONGRESS, *supra* note 246, at 2.

creation and dissemination of expression, and for a post office, to deliver the mail and the news.<sup>311</sup> Federal regulations demonstrate a sweeping preference for openness, reflected in the Freedom of Information Act, Government in the Sunshine Act, and dozens of other laws applicable to the government. There are even more laws requiring disclosure by private industry, such as the regulatory disclosures required by securities and commodities laws, banking and insurance laws, and many others.

The focus on openness both advances and restricts privacy interests. It furthers privacy by guaranteeing that citizens have affordable access to data, particularly about themselves, thereby facilitating the identification and correction of inaccurate information. This is a key function, for example, of the disclosure requirements in the FOIA. It also facilitates privacy protection by supporting a vigorous, independent press, which has repeatedly proved invaluable in investigating and exposing privacy intrusions by both government and private parties.<sup>312</sup>

The focus on openness, however, also reflects an understanding that in a democracy and a market economy, privacy is not an unmitigated good. As a result, efforts to enhance personal privacy are balanced against the costs that those efforts impose on the free flow of information, the election and supervision of governments, the development of efficient markets, and the provision of valuable services.

Protecting the privacy of information imposes real costs on individuals and institutions. Judge Richard Posner has written:

Much of the demand for privacy . . . concerns discreditable information,

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311. See U.S. CONST. art. I, § 8.

312. In 1991, Lotus Development Corporation and Equifax abandoned plans to sell "Households," a CD-ROM database containing names, addresses, and marketing information on 120 million consumers, after receiving 30,000 calls and letters from individuals asking to be removed from the database. See Lawrence M. Fisher, *New Data Base Ended by Lotus and Equifax*, N.Y. TIMES, Jan. 24, 1991, at D4. Cancellation of "Households" led Lotus to abandon "Lotus Marketplace," a similar CD-ROM database with information on seven million U.S. businesses. Eight months later, Equifax, one of the United States' largest credit bureaus, decided to stop selling consumer names and addresses to direct marketing firms altogether, a business that had earned the company \$11 million the previous year. See Shelby Gilje, *Credit Bureau Won't Sell Names*, SEATTLE TIMES, Aug. 9, 1991, at D6.

More recently, Lexis-Nexis, operator of one of the largest legal and general information databases in the world, has revamped plans for "P-Track," a service that provides anyone willing to pay the \$85-\$100 search fee with personal information, including maiden names and aliases, about "virtually every individual in America." Kathy M. Kristof, *Deluged Lexis Purging Names from Databases*, L.A. TIMES, Nov. 8, 1996, at D5. The database reportedly includes current and previous addresses, birth dates, home telephone numbers, maiden names, and aliases. Initially, Lexis was also providing Social Security numbers. However, in response to a storm of protest, Lexis stopped displaying Social Security numbers, and it is honoring the requests of anyone who wishes to be deleted from the database. See *id.*

often information concerning past or present criminal activity or moral conduct at variance with a person's professed moral standards. And often the motive for concealment is . . . to mislead those with whom he transacts. Other private information that people wish to conceal, while not strictly discreditable, would if revealed correct misapprehensions that the individual is trying to exploit . . .<sup>313</sup>

Privacy facilitates the dissemination of false information, protects the withholding of relevant true information, and interferes with the collection, organization, and storage of information on which businesses and others can draw to make rapid, informed decisions. The costs of privacy include both transactional costs incurred by information users seeking to determine the accuracy and completeness of the information they receive, and the risk of future losses resulting from inaccurate and incomplete information. Therefore, privacy may reduce productivity, lead to higher prices for products and services, and make some services untenable altogether.

Moreover, even when the information disclosed is not inherently significant, or in the context of a relationship where health or safety are at stake, there is nonetheless value in curiosity. As Judge Posner has noted, "casual prying" is not only a common feature of everyday life, it "is also motivated, to a greater extent than we may realize, by rational considerations of self-interest. Prying enables one to form a more accurate picture of a friend or colleague, and the knowledge gained is useful in one's social or professional dealings with him."<sup>314</sup> Even the term "idle curiosity," according to Judge Posner, is "misleading. People are not given to random, undifferentiated curiosity."<sup>315</sup> For example, "[g]ossip columns recount the personal lives of wealthy and successful people whose tastes and habits offer models—that is, yield information—to the ordinary person in making consumption, career, and other choices. . . . [They] open people's eyes to opportunities and dangers; they are genuinely informational."<sup>316</sup> Protection for privacy, therefore, not only interferes with the acquisition of information that has a particular, identified significance, it also impedes a voyeuristic curiosity that is widely shared and that serves valuable purposes for both individuals and society.

The protection of privacy may also interfere with other constitutional values, such as the protection for expression in the First Amendment and the protection for private property in the Fifth Amendment.

The late Professor Anne Branscomb wrote: "Information is the lifeblood that sustains political, social, and business decisions."<sup>317</sup> Although U.S. law offers extensive protection to individuals from government collection and use of

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313. Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 399 (1978).

314. *Id.* at 395-96.

315. *Id.* at 396.

316. *Id.*

317. Anne W. Branscomb, *Global Governance of Global Networks: A Survey of Transborder Data Flow in Transition*, 36 VAND. L. REV. 985, 987 (1983).

personal data, the commitment to open information flows is so great that our laws extend virtually no direct protection to data, other than trade secrets, in the marketplace.

3. *Preference for Private Action.*—The third significant feature is that the United States has historically depended heavily on private industry, private property, and individual self-reliance. Constitutional rights are generally “negative”; they do not obligate the government to *do* anything, but rather to *refrain* from unnecessarily interfering with individuals’ freedom to act. This also explains the very high protection in U.S. law for private agreements. Citizens do not have to make promises to one another, but when we do, the government makes available valuable resources to enforce those promises.

The preference for private action and individual responsibility is especially clear when information is involved. The U.S. Supreme Court has repeatedly interpreted the First Amendment to deny plaintiffs aggrieved by even false and harmful speech any remedy, stressing instead, in the words of Justice Brandeis, “the remedy to be applied is more speech, not enforced silence.”<sup>318</sup>

The focus on individual and collective private action inevitably restrains the power of the government to pass sweeping privacy laws. But it also facilitates considerable privacy protection through the use of technologies, markets, industry self-regulation and competitive behavior, and individual judgment. For example, technological innovations such as adjustable privacy protection settings in both Netscape and Microsoft Explorer, encryption software, anonymous remailers, and, in fact, the Internet itself all facilitate privacy and individual control over the information we disclose about ourselves.

Many companies are actively competing for customers by promoting their privacy policies and practices. If enough consumers demand better privacy protection and back up that demand, if necessary, by withdrawing their patronage, virtually all competitive industry sectors are certain to respond to that market demand. In fact, consumer inquiries about, and response to, corporate privacy policies are an excellent measure of how much the society really values privacy.

Considerable privacy protection also exists in private agreements. When a company promotes its privacy policy, under U.S. law it is obligated to adhere to that policy. The failure to do so may subject an institution to suits by consumers and action by the Federal Trade Commission, which is empowered by Congress to investigate “unfair or deceptive” trade practices.<sup>319</sup>

Industry organizations are increasingly providing standards for privacy protection and help to consumers whose privacy interests are compromised. The Direct Marketing Association, for example, operates the Mail Preference Service and the Telephone Preference Service. With a single request to each, it is possible to be removed from most DMA-member company mailing and telephone

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318. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 497 (1996); *Texas v. Johnson*, 491 U.S. 397, 419 (1989).

319. See 15 U.S.C. § 57b-1(1997).

solicitation lists.<sup>320</sup>

Many industry associations have adopted guidelines and principles which may serve as models for individual company policies. Corporate compliance with privacy standards constitutes an increasingly important accolade in competitive markets, particularly among Internet users. Moreover, industry associations can help persuade member organizations to adopt and adhere to industry norms for privacy protection. The DMA, for example, has begun issuing quarterly reports on members who are being disciplined for violating DMA codes of conduct.

A consortium of privacy advocates and software companies has announced the development of a service to make privacy self-help easier on the Internet. "TRUSTe" is a program that rates Internet sites according to how well they protect individual privacy. Internet sites that provide sufficient protection for individual privacy—including not collecting personal information, not disseminating information to third parties, and not using information for secondary purposes—earn the right to display the "TRUSTe" logo.<sup>321</sup> The Better Business Bureau has recently launched a similar initiative—BBB Online.<sup>322</sup>

The majority of the individual reference services group industry has agreed to abide by the ISRG Principles, which not only establish data protection standards, but also require annual compliance audits by third parties and a commitment not to provide information to entities whose practices are inconsistent with the ISRG Principles.<sup>323</sup>

These more flexible, more contextual, more specific tools offer better privacy protection than an omnibus law, and at potentially lower cost to consumers, businesses, and the society as a whole. These responses are exactly what we would expect from the market if consumers value privacy protection in the private sector.

4. *Limited Role for Government.*—Finally, the United States has historically recognized important roles for government to keep markets open, to fill in those gaps necessary to protect vulnerable populations, such as children, and to respond to needs left unmet by traditional markets, such as protecting the environment.

The same is true for privacy. The government still plays an important role in protecting privacy, but the legal regulation of privacy in the U.S. private sector is largely limited to facilitating individual action. For example, Congress recently enacted federal restrictions on collecting information from children

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320. See Direct Marketing Association, *Frequently Asked Questions to Help You Understand Direct Marketing* <<http://www.the-dma.org/topframe/index5.html>>. The DMA reports that these service are used by only two percent of the U.S. adult population.

321. See *How the TRUSTe Program Works* (visited Dec. 1, 1999) <<http://www.truste.org>>.

322. See *BBB Online Privacy Program* (visited Dec. 1, 1999) <<http://www.BBBOnLine.org/>>.

323. See FEDERAL TRADE COMMISSION, INDIVIDUAL REFERENCE SERVICES: A REPORT TO CONGRESS (1997).

online,<sup>324</sup> and has put in place extensive data protection regulation applicable to local telephone service<sup>325</sup> and cable television providers,<sup>326</sup> which rarely operate in markets offering consumers real competitive choice. In those and similar situations, the law provides important but carefully circumscribed, basic privacy rights, the purpose of which is to facilitate—not interfere with—the development of private mechanisms and individual choice as the preferred means of valuing and protecting privacy.

## CONCLUSION

An ocean of ink has been spilled comparing European and U.S. privacy protection and predicting the impact of the EU data protection directive on U.S.-European relations. At its core, the impact of the directive will be measured by the provisions of the fifteen member states' national laws transposing the directive's requirements. As ten of those countries have yet to be heard from, and in the face of many and frequent political and technological developments, predictions about the future are not only uncertain, but also likely to be unwise. With that caution clearly in mind, however, I want to advance five observations about the changing face of privacy protection in Europe and the United States. While these may strike many readers as obvious, I believe they are important to understanding and perhaps even anticipating future developments.

### *A. The Value of Privacy and the Role of the Government in Protecting It*

First, while Europe and the United States share many values, the systems of privacy protection reflected in the EU directive and U.S. law diverge most sharply on how much they value privacy, especially in competition with other goals, and on the appropriate role for the government in protecting privacy. The directive is based on the stated belief that information privacy is a basic human right, on par with the rights of self-determination, freedom of thought, and freedom of expression. Article 1 of the EU directive obligates member states to protect the "fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data."<sup>327</sup>

The primacy of the right to privacy is further reflected in the text of the directive, which permits member states to carve out exceptions "for the processing of personal data carried out solely for journalistic purposes or the purposes of artistic or literary expressions which prove necessary to reconcile the right to privacy with the rules governing freedom of expression,"<sup>328</sup> but only with regard to two of the directive's substantive provisions. Member states may create exceptions to the prohibition on processing sensitive data, and the requirement

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324. See Children's Online Privacy Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

325. See 18 U.S.C. §§ 2510-2520, 2701-2709 (1997); 47 U.S.C. §§ 222, 1001-10 (1997).

326. See 47 U.S.C. § 551(a) (1997).

327. *Directive 95/46/EC*, *supra* note 44, art. 1(1).

328. *Id.* art. 9.

that data subjects be notified of information processing activities.<sup>329</sup> By the omission of any reference to the other substantive rights from the article permitting exceptions for expressive undertakings, it is clear that the directive's drafters believe that the protection of privacy is paramount to freedom of expression and the activities of the press and other authors and artists.

As a result of the extraordinary value, it places on information privacy, the EU data protection directive requires persons who wish to collect, process, use, store, and disseminate personal information to register with their national data protection supervisory authority. This scheme is anathema to the U.S. constitutional system, which so highly values freedom of expression and of the press, freedom from government intrusion, and protection of private property, and which frankly places less value on privacy. Privacy protection in the United States is fundamentally in tension with other values. Even if the law did not recognize these competing values and regard privacy as imposing both benefits and costs, the nation's constitutional commitment to a government of limited powers, particularly when expression is involved, poses a substantial obstacle to the creation of government privacy authority. This suggests a core difference between European and U.S. privacy protection: the extent to which the government is responsible for protecting information privacy. According to Jane Kirtley, former Executive Director of the Reporters Committee for Freedom of the Press:

Privacy advocates urge the adoption of the European model for data protection in the name of protecting individual civil liberties. But in so doing, they ignore, or repudiate, an important aspect of the American democratic tradition: distrust of powerful central government. . . . [W]hen it comes to privacy, Americans generally do not assume that the government necessarily has citizens' best interests at heart. . . . The European paradigm assumes a much higher comfort level with a far more authoritarian government.<sup>330</sup>

### *B. The Restriction on Transborder Data Flow*

Article 25 of the EU directive only exacerbates the divergence between EU and U.S. law by seeking to extend European privacy laws beyond the territories of the nations enacting those laws. This effort is understandable in light of the directive's treatment of privacy as a human right, and necessary if the privacy of European nationals is to be protected effectively in a global information economy. However, Article 25 is justifiably criticized as an effort to establish European protection for information privacy as a global standard. Because of the difficulty of separating data collected within Europe from data collected elsewhere, the directive effectively requires multinational businesses to conform

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329. See *id.*

330. Jane E. Kirtley, *The EU Data Protection and the First Amendment: Why a "Press Exemption" Won't Work*, 80 IOWA L. REV. 639, 648-49 (1995).

all of their data processing activities to EU law or to self-regulatory or contractual provisions that mirror EU law. Even businesses that do not operate in Europe may run afoul of the directive if they collect, process, or disseminate personal data about European nations or via multinational networks.

As a result, U.S. businesses with interests in personal data collected, stored, or processed in Europe, and particularly U.S. businesses with operations in Europe, fear that they will be unable to move those data legally—even if they “own” them—to the United States.

The concerns of non-European information users are not misplaced. Although the directive only took effect in 1998, the British Data Protection Registrar has forbidden, under British law, a proposed sale of a British mailing list to a United States direct mail organization.<sup>331</sup> France, acting under French domestic law, has prohibited the French subsidiary of an Italian parent company from transferring data to Italy because Italy did not have an omnibus data protection law.<sup>332</sup> The French Commission nationale de l'informatique et des libertés has required that identifying information be removed from patient records before they could be transferred to Belgium,<sup>333</sup> Switzerland,<sup>334</sup> and the United States.<sup>335</sup>

The United States' fear about the impact of the directive is still further exacerbated by the EU Working Party's skepticism towards extra-legal protections for privacy. In the United States, industry self-regulation and private agreements are the primary means of protecting privacy. So the Working Party's conclusion that these should be the exception, not the norm, in measuring the adequacy of privacy protection decreases the likelihood that European data protection officials will find privacy protection in the United States to be “adequate.”

At its heart, however, Article 25 is merely the most recent evidence of an expanding phenomenon: the effort to use national or regional law to deal with fundamentally global issues. As we have already seen, information is inherently global. It is because of its inherently global character that information has been the subject of some of the earliest multinational agreements, treaties, and organizations. Binational postal treaties were concluded as early as 1601 between France and Spain and 1670 between France and England.<sup>336</sup> The Postal Congress of Berne in 1874 established a multinational postal

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331. See Office of the [UK] Data Protection Registrar, *Seventh Annual Report* 33-34 (1990).

332. See Délibération No. 89-78 du 11 juillet 1989, reprinted in Commission nationale de l'informatique et des libertés, 10e Rapport 32-34 (1989).

333. See Délibération No. 89-98 du 26 sept. 1989, reprinted in Commission nationale de l'informatique et des libertés, 10e Rapport d'activité 35-37 (1990).

334. See Reidenberg, *supra* note 38, at S163 (citing an interview with Ariane Mole, Attachée Relations internationales, Direction juridique de la Commission nationale de l'informatique et des libertés, Paris, France (Jun. 6, 1991)).

335. See *id.*

336. See Ludwig Weber, *Postal Communications, International Regulation*, 5 ENCYCLOPEDIA OF PUBLIC INT'L LAW 238 (1983).

regime—administered today by the Universal Postal Union—seventy-four years before the General Agreement on Tariffs and Trade was opened for signature.<sup>337</sup>

Today, when data processing is wholly dominated by networked computers, information is difficult to pinpoint and almost impossible to block, through either legal or technological means. Digital information not only ignores national borders, but also those of states, territories, and even individual institutions. Not surprisingly, the inherently global nature of digital information poses extraordinary challenges to the power of national governments, and efforts to use national law to deal regulate information in one jurisdiction often pose substantial legal and practical issues in another.

This is the conundrum that Article 25 has come to symbolize. If the directive did not extend to data processing activities outside of the EU, it would be certain to fail, because of the ease with which those activities can be moved off-shore. However, by extending its application beyond the jurisdiction of EU member states, the directive presents a host of international law issues, conflicts with the information law regimes of other nations, and is hardly more likely to be effective. If a regulatory approach is to be pursued, then global standards are necessary. But the conflict between the core values of the European and U.S. systems of privacy protection makes global consensus on effective privacy standards little more than a mirage. In short, national approaches to regulating information are becoming increasingly ineffective, at the very time that the economic power of information is increasing the pressure for national governments to pursue those approaches.

### C. *The Search for Compromise*

Despite the profound differences in core principles undergirding U.S. and European privacy law, there is likely to be some accommodation between U.S. and European interests. Both European and U.S. officials have a significant economic interest in avoiding such a trade dispute, and both sides have thus far worked diligently to do so. European data protection officials have shown an increasing willingness to at least consider the privacy protection models offered by the rest of the world. The Working Party's later working documents, while still firm about the definition of "adequacy," are more moderate in tone than were earlier documents.

United States' officials, for their part, are growing more attentive to European officials and European concerns. At the same time, as already noted, both U.S. federal and state government officials are considering increased legislation and regulation to protect information privacy. While U.S. law is likely to satisfy the "adequacy" requirement of the EU data protection directive, all of this activity has given U.S. officials something to talk about, and European

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337. See *id.*; General Agreement on Tariffs and Trade, *opened for signature* Jan. 1, 1948, 61 Stat. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 188. See generally Fred H. Cate, *Introduction—Sovereignty and the Globalization of Intellectual Property*, 6 IND. J. GLOBAL LEG. STUD. 1 (1998).

officials some sign of “positive” movement to seize on, during extensive U.S.-EU face-to-face exchanges designed to avoid confrontation over data protection.

Moreover, European data protection officials are interested in some level of compromise not only because of their own desire to avoid a trade war and the positive signs emanating from the U.S. government, but also because they are subject to considerable pressure from within Europe. While gaining new stature by virtue of passage of the directive, European privacy regulators are nonetheless subject to pressure from European businesses, which do not want their trading relationships with U.S. companies sacrificed in the interest of data protection; European consumers, who do not want to be denied the services and products offered by non-European organizations; and other government officials in European national governments and in the EU itself, who are anxious to avoid a trade dispute. And European officials responsible for trade, while not ignoring privacy issues, have demonstrated a broader, more optimistic view of EU-United States trade relations.

These trends are clearly in evidence in the current efforts of the U.S. Department of Commerce and Directorate General XV of the European Commission to negotiate a “safe harbor” to allow U.S. companies to comply with the directive, despite the absence of “adequate” data protection law in the United States. Under the safe harbor, “[o]rganizations within the safe harbor would have a presumption of adequacy and data transfers from the European Community to them would continue. Organizations could come within the safe harbor by self-certifying that they adhere to these privacy principles. The status quo ante would exist for firms that choose not to take advantage of the safe harbor.”<sup>338</sup>

Judging from current drafts, the safe harbor principles are substantially meaningless; they simply restate the basic principles that undergird the directive.<sup>339</sup> Moreover, the negotiations appear to have run aground in recent weeks in the face of widespread opposition from both Europe and the United States. The negotiations do, however, reflect the efforts of U.S. and EU officials to find some common ground on data protection. A recent letter from Ambassador David L. Aaron, Under Secretary of Commerce for International Trade Affairs, to U.S. industry leaders signals the tone of the discussions:

We have discovered that, despite our differences in approach, there is a great deal of overlap between U.S. and EU views on privacy. Given that and to minimize the uncertainty that has arisen about the Directive's effect on transborder data transfers from the European Community to the United States, the Department of Commerce and the European

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338. Letter from Ambassador David L. Aaron, Under Secretary for International Trade Affairs, International Trade Administration, U.S. Department of Commerce, to “Industry Representatives,” (Nov. 4, 1998), *available in* <<http://www.ita.doc.gov/ecom/aaron114.html>> [hereinafter Letter from Ambassador Aaron].

339. See *id.* <<http://www.ita.doc.gov/ecom/menu.htm#Safe>>; see also Comments of Fred H. Cate, Robert E. Litan, Joel R. Reidenberg, Paul M. Schwartz & Peter P. Swire on International Safe Harbor Principles <<http://www.ita.doc.gov/ecom/comabc.htm#cate>>.

Commission have discussed creating a safe harbor for U.S. companies that choose voluntarily to adhere to certain privacy principles.<sup>340</sup>

Moreover, it is also noteworthy that the negotiations involve DG XV, which deals with the internal market and financial services issues within the EU, rather than the Article 29 Working Party, which has responsibility for data protection.

In addition to governmental efforts, many U.S. businesses, individually and as part of industry associations, have engaged in a widespread campaign to inform European regulators about data protection in the United States, improve their own privacy practices, and develop innovative extra-legal guarantees of better privacy protection to EU data protection officials. Obviously, not all of these efforts are in response to European developments; U.S. businesses are reacting to domestic consumer and political pressure as well. But the actions of these businesses, however motivated, are expanding the room for compromise and increasing the likelihood that at least in some industry sectors in the United States, data protection will be found to be "adequate."<sup>341</sup>

Taken together, the efforts of the European and U.S. government officials, internal European pressures and lack of resources experienced by many European data protection officials, and the broad-based actions of at least some U.S. businesses seem likely to diminish the likelihood of a trade war resulting from enforcement from Article 25 of the EU data protection directive. Certainly there will be at least limited enforcement of Article 25, and some U.S. businesses—perhaps many—will be caught unaware. But the possibility of an outright trade war is remote.<sup>342</sup>

#### *D. The Role of the Internet*

Fourth, regulatory approaches to protection privacy seem ill-suited to the Internet. The EU directive purports to create broad protection for personal privacy, but it is ill-suited to a far-flung, inherently global medium such as the Internet, as EU data protection officials have acknowledged. Recall that the directive was drafted *before* the World Wide Web was even invented. In an expansive information economy, centralized control—based on registration and direct government oversight—cannot provide meaningful privacy protection. The directive was designed for a world in which data processing took place in comparatively few, easily identifiable locations, usually with mainframe computers. With the power and widely distributed technologies of the Internet and other digital networks, the directive's centralized approach to privacy protection is outdated. Moreover, national or regional controls are particularly easy to circumvent in the Internet environment, simply by moving data processing activities outside of the territory affected. Finally, the lack of

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340. Letter from Ambassador Aaron, *supra* note 338.

341. See, e.g., John F. Mogg, Comments to the European-American Business Council, Washington, DC (Mar. 18, 1998).

342. See generally Fred H. Cate, *The European Data Protection Directive and European-U.S. Trade*, CURRENTS vol. VII, no. 1, at 61 (1998).

resources for government enforcement, especially when confronted with such widespread data processing, further diminishes the likely role of the directive as an effective means of protecting privacy online.

The U.S. legal system's protection for privacy online is similarly limited, although in very different ways. There is less of a gap between the level of protection promised by the law and the level actually delivered, because the law promises substantially less protection to U.S. citizens. At present, the law only directly protects privacy online in two settings: government collection and use of data, and the collection of data from children. Otherwise, individuals may use contracts, agreements with their Internet service providers, technological tools in Internet browsers and other software, and common sense to protect their privacy online. The law may be used to enforce private promises, but, in all areas other than government data processing and data collection from children, the law largely leaves citizens to their own devices, recognizing that the technologies of the Internet may be unusually effective in protecting privacy.

The technologies and current structure of the Internet largely frustrate regulation. That may not always be the case and that certainly does not mean that effective regulation is always impossible, but merely that it is time-consuming, expensive, and seldom effective for long. In the now-famous words of John Gilmore, one of the founders of the Electronic Frontier Foundation, "the Net treats censorship as damage and routes around it."<sup>343</sup> Encryption technologies, anonymous remailers, multinational access, and other features of the Internet make it comparatively easy for even unsophisticated users to avoid regulation, and information that is not available from one online source is almost certain to be obtainable from another. The effect of much regulation of Internet content is simply to discourage law-abiding information providers, thereby leaving a gap that is often filled by less scrupulous providers.

These same technologies that distort the application of laws and facilitate their evasion also provide important tools for protecting vital interests. Digital technologies offer individuals enormous privacy protection and the ability to access information without disclosing anything about themselves. This is not to suggest that technologies are a panacea or that law is irrelevant, but simply that the Internet is empowering many people to protect their rights in a way that the law so far has been able to.

#### *E. The Future of U.S. Information Law*

Finally, while the EU system of data protection may be well suited to Europe, privacy protection in the United States responds to core values in this society and system of government. Certainly, that protection may be improved, but U.S. government and business leaders should avoid imposing costly new privacy protection merely as a sop to European data protection officials. As noted, the four-part approach to information privacy in the United States highlights important limits on that protection, reflected in U.S. law, markets, and

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343. Judith Lewis, *Why Johnny Can't Surf*, L.A. WKLY., Feb. 21, 1997, at 43.

consumers. Those limits protect other important values, such as free expression; they avoid imposing unnecessary costs on commercial and social interaction of all forms, especially electronic; and they protect against creating the illusion of government-enforced privacy while in fact interfering with the development and use of more practical means for protecting information about individual citizens.

At heart, the debate about information privacy is fundamentally one about controlling information. Privacy is often confused with other issues—security, reliability, verifiability, anonymity, and so on—and to be sure it relates to other concepts; but at its core privacy is about who controls the collection, dissemination, storage, and use of information about individuals; under what authority or compulsion do they exercise that control; and what responsibilities, if any, attend that control.

In the United States, the law has historically prevented the government from exercising control over information collection and dissemination by private individuals and institutions. The law may require disclosure of certain information, especially to facilitate self-governance and open markets, but it rarely prohibits disclosure. Instead, U.S. law most often places control over information in the hands of citizens.

The U.S. approach to information privacy inevitably results in some harm to individuals' privacy, reputations, and sensibilities. But it reflects a constitutional calculation that such harm is less threatening to the body politic than the harm associated with centralized privacy protection, government interference with the information flows necessary to sustain democracies and markets, and the growing ineffectiveness of omnibus legal controls in the face of the widespread proliferation of powerful information technologies. We should be loathe to alter that delicate constitutional balance lightly, by granting to the government new authority to interfere with the flow of information in the search for new—but often illusory and costly—protection for personal privacy.

# **IDENTITY, PRIVACY, AND THE NEW INFORMATION SCALPERS: RECALIBRATING THE RULES OF THE ROAD IN THE AGE OF THE INFOBAHN: A RESPONSE TO FRED H. CATE**

RONALD J. KROTSZYNSKI, JR.\*

Bernard: Oh Brave New World that has such people in it. Let's start at once.

John: Hadn't you better wait till you actually see the new world?<sup>1</sup>

## **INTRODUCTION**

Professor Fred Cate makes a powerful and cogent argument against the adoption of European-style privacy regulations in the United States.<sup>2</sup> To the extent that Professor Cate rests his argument against the adoption of privacy regulations modeled on the European Union's approach solely on policy-based grounds, he makes some important, indeed powerful, points. There is, as Professor Cate suggests, good cause to think that the European Union's approach overvalues individual privacy interests at the expense of facilitating commerce.<sup>3</sup> Even if this is so, however, one might question whether Professor Cate's preferred approach to privacy protection in the United States—reliance on market forces to protect privacy interests—is sufficient to the task at hand. Reasonable minds can and will differ as to whether the market predictably will vindicate the legitimate privacy expectations of the citizenry.

Recent events, such as Amazon.com's "fun" practice of releasing employer-by-employer information about employees' purchases from the company,<sup>4</sup> or the

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1. ALDOUS HUXLEY, BRAVE NEW WORLD 165-66 (1946); cf. WILLIAM SHAKESPEARE, THE TEMPEST, act 5, sc. 1, at 124 (Frank Kenmode ed., 6th ed., Harvard Univ. Press 1958) (Miranda speaking, "O, wonder!/How many goodly creatures are there here!/How beauteous mankind is! O brave new world/That has such people in it!). In my view, Huxley's caution is far more prudent than Shakespeare's blind, unreflective enthusiasm.

2. See Fred H. Cate, *The Changing Face of Privacy Protection in the European Union and the United States*, 33 IND. L. REV. 173 (1999).

3. See *id.* at 180-95, 225-30.

4. See David Streitfeld, *Who's Reading What? Using Powerful "Data Mining" Technology, Amazon.com Stirs an Internet Controversy*, WASH. POST, Aug. 27, 1999, at A1. This is hardly innocent. Suppose that employees were afficiandos of Scott Adams' *Dilbert* cartoons or were purchasing mass quantities of *How to Spruce Up Your Resume* titles? All things being equal, an employee would probably prefer that her employer not have ready access to her reading, music, or video tastes. For a discussion of the market's failure adequately to protect reasonable privacy expectations, see Jerry Berman & Deirdre Mulligan, *Privacy in the Digital Age: A Work in*

practice of telephone companies selling information about their customers to third parties,<sup>5</sup> raise serious doubts about the wisdom of trusting privacy protection to the invisible hand's not-so-tender mercies. Moreover, whatever the wisdom of federal or state legislation protecting individual privacy interests, I disagree quite strongly with Professor Cate's assertions about the legal authority of the federal or state governments to enact such laws.<sup>6</sup> As this Essay will explain more fully below, the Bill of Rights should not be read to preclude the vindication of reasonable privacy interests through appropriate legislation, even if restrictions protecting the confidentiality of personal information incidentally burden commercial speech or information gathering practices associated with commercial speech.<sup>7</sup>

In this era of technological marvels, of virtual reality and e-commerce, it is all too easy to become enamored of the obvious (and highly touted) benefits of technology, without giving careful consideration to the costs associated with the introduction of new technologies on society generally and on each of us individually. Indeed, the German existentialist philosopher Martin Heidegger deeply distrusted technology following the turn of the last century.<sup>8</sup> Despairing of modernity and its focus on the here and now, he took to wearing the garb of a Bavarian peasant and fled to the hills (quite literally to a secluded cabin in the depths of the Black Forest).<sup>9</sup>

Heidegger warned that technology threatened what he called the "Enframing" of "Being."<sup>10</sup> By this, he meant that as technology increased the pace of everyday life, people would find less and less time for meaningful reflection; individuals would live in the world of mundane tasks (bus to be caught, report to be filed) rather than "authentically," which for Heidegger meant living every moment with some consciousness of one's own mortality.<sup>11</sup> To the extent that the wonders of technology lead us to forget the blunt reality of our mortality,

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Progress, 23 NOVA L. REV. 552, 563-68 (1999).

5. See Shu Shin Luh, *FCC to Fight Ruling on Customer Data*, WASH. POST, Sept. 4, 1999, at E2.

6. See *infra* Part II.A-B.

7. See *infra* Part II.A-B.

8. See Martin Heidegger, *The Question Concerning Technology*, in THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS 3-35 (William Lovitt trans., Garland 1977) [hereinafter *The Question Concerning Technology*]; Martin Heidegger, *The Turning Point*, in *id.* at 38-49 [hereinafter *The Turning*].

9. See RUDIGER SAFRANSKI, MARTIN HEIDEGGER: BETWEEN GOOD AND EVIL 131, 185-86 (Ewald Osers trans., Harv. Univ. 1998).

10. *The Question Concerning Technology*, *supra* note 8, at 25-28; *The Turning*, *supra* note 8, at 37-41, 48-49.

11. Heidegger referred to this as "authentic" Being—that is to say, making choices and living with the consequences of these choices with full and actualized knowledge that one has only a limited period of time in which to exercise the power of choice in light of the certainty of death. See MARTIN HEIDEGGER, BEING AND TIME 78-86, Ch. I, Pt. 2, §§ 12, 293-311, Ch. II, Pt. 1, §§ 50-53 (John Macquarrie & Edward Robinson trans., 1962).

technology robs us of our ability to make good choices (that is to say, choices that we would make if we reflected about a particular matter in light of our own mortality).

More recently, Theodore Kaczynski embraced a neo-Heideggerian world view and went about destroying the purveyors of technology with mail bombs. Kaczynski, of course, is a deluded madman, who saw violence as the only means of reasserting human control over a world that seemed (to Kaczynski) to be defined and controlled by technology.<sup>12</sup> Like Heidegger, Kaczynski feared that society would permit technology to define our humanity rather than harness technology to accomplish tasks selected independently of technology's ability to accomplish them.<sup>13</sup>

In Kaczynski's view, "[t]he industrial revolution and its consequences have been a disaster for the human race," and "[t]he continued development of technology will worsen the situation."<sup>14</sup> He goes on to explain that "[t]he technophiles are taking us all on an utterly reckless ride into the unknown."<sup>15</sup> Consistent with Heidegger's philosophy, Kaczynski advocates a return to nature because "[n]ature makes a perfect counter-ideal to technology."<sup>16</sup>

I deplore Kaczynski's action plan and believe that, not unlike the Luddites before him, he did a great deal more harm than good for his cause. Similarly, I rather doubt that dressing in Bavarian peasant garb and taking to the hills represents an acceptable plan of action for dealing with the new problems and challenges that technology presents. If those of us who severely mistrust the Microsofts of the world, who inevitably pop up every few months bearing new upgrades, choose to disengage and withdraw from the fray, new technologies simply will grow unchecked like weeds. Moreover, the consequences of those technologies will be considered systematically only *after* they have altered the basic chemistry of our society.<sup>17</sup> As the saying goes, once released, it is difficult to put the genie back into the bottle.

It is therefore essential that we ask hard questions of those who would lead us into a brave new world before agreeing to make the journey. Before we

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12. See Martin Gottlieb, *Pattern Emerges in Bombing Tract*, N.Y. TIMES, Aug. 2, 1995, at A1; Robert D. McFadden, *Times and the Washington Post Grant Mail Bomber Demand*, N.Y. TIMES, Sept. 19, 1995, at A1; see also THEODORE J. KACZYNSKI, *UNABOMBER MANIFESTO: INDUSTRIAL SOCIETY AND ITS FUTURE* (1996).

13. See KACZYNSKI, *supra* note 12. The *Washington Post* published Kaczynski's *Manifesto* in full on Tuesday, September 19, 1995, as a supplement to its regular edition. See FC, *Industrial Society and Its Future*, WASH. POST, Sept. 19, 1995. For a more concise version of Kaczynski's position on technology, see *Excerpts from Manuscript Linked to Suspect in 17-Year Series of Bombings*, N.Y. TIMES, Aug. 2, 1995, at A16.

14. KACZYNSKI, *supra* note 12, at 1 ¶ 1.

15. *Id.* at 29, ¶ 180; *see also id.* at 20-22.

16. *Id.* at 29, ¶ 184.

17. See ELIZABETH EINSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* (1979); M. Ethan Katsh, *Rights, Camera, Action: Cyberspatial Settings and the First Amendment*, 104 YALE L.J. 1681, 1685-92, 1703-17 (1995).

blithely embrace the ostensible benefits of gizmos and programs that allow us to do things cheaper, faster, and better (or so we are supposed to believe), we must first demand answers to serious questions about the desirability of such devices and their potential social costs.

Technology for technology's sake is no virtue, and a healthy appreciation for the accomplishments of the past (and the means used to achieve them) is no vice.<sup>18</sup> Perhaps synthesizers and computer-assisted musical composition will lead us into a new and wonderful world in which Mozarts, Beethovens, and Verdis abound. You will have to pardon me if I express some doubts about this; for it seems that one of the necessary consequences of technology is homogenization and standardization. A program that assists a composer in creating a bar of music assists every composer using the same lines of code; it undoubtedly makes composing easier, but there is likely to be a good deal of sameness to the resulting compositions.

Similarly, mass production and technology allow anyone with a few hundred dollars to own a perfectly executed piece of jewelry. One wonders, though, if these technologies will give us the wonders that Faberge wrought for the Tsars? At least arguably, the homogenizing effects of technology make it less likely that someone with the talent of a Faberge will fully realize that talent.

If one looks to many of the great works of art or literature, they are the product of great suffering and a society that presented hardships and challenges. Michelangelo's Sistine Chapel is not the product of Java graphics—nor do I think it ever could be. Richard Wright's *Native Son* could only have been conceived and executed by someone who had lived through the horrors and depredations of Mississippi in the Jim Crow era. Make no mistake, I am not arguing that we should work to create a world in which prejudice, sickness, and death are commonplace because an artist's reaction to such conditions can give rise to works of power and beauty. Rather, I am simply suggesting that the convenience and comfort that technology often bring may entail greater difficulty in creating works that are, for better or worse, in part a product of the social conditions extant at the time of their creation.

## I. DRAWING THE BATTLE LINES

It is time to draw some battle lines—to challenge the unquestioned march of technology into our lives. To the extent that technology helps us to do things that we freely seek to accomplish, it is a powerful friend. On the other hand, to the extent that purveyors of technology seek to force us to change the way we go about being in the world in order to accommodate a new technology, to the extent that we are forced to change who we are and how we go about our daily lives

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18. See LORI B. ANDREWS, *THE CLONE AGE!: ADVENTURES IN THE NEW WORLD OF REPRODUCTIVE TECHNOLOGY* (1979) (discussing the potential social impact of new medical technologies and procedures with particular attention to cloning); GEORGE ANNAS, *SOME CHOICE: LAW, MEDICINE AND THE MARKET* 3-79, 249-59 (1998) (discussing the ethical questions raised by new medical technologies and procedures).

solely in order to accommodate a new technology, we have a legitimate complaint with the seemingly ceaseless forward march of modernity.

Privacy presents one of these “quo vadis” social questions: Shall we permit our identities to be bundled and sold like sacks of potatoes, or rather shall we demand some protection from the power of technology to collect and sell data about everything from where we bank, to what we earn, to what we watch on cable television? As Professor Cate says, the need to have such a debate “is prompted largely by extraordinary technological innovations that are dramatically expanding both the practical ability to collect and use personal data and the economic incentive to do so.”<sup>19</sup> Moreover, he correctly posits that “[t]he ramifications of such a readily accessible storehouse of electronic information are astonishing: others know more about you—even things you may not know about yourself—than ever before.”<sup>20</sup>

Given this state of affairs, it seems crucial that citizens demand protection against the involuntary dissemination of confidential information of this sort.<sup>21</sup> Neither my physician nor my banker should enjoy the legal right to sell information about my physical or financial health. Traditionally, tort law has prohibited the public disclosure of private facts.<sup>22</sup> There is no reason that Congress, state legislatures, and state supreme courts should not apply this traditional common law rule to prevent the unauthorized transfer of highly personal information from those providing particular goods or services.<sup>23</sup>

Indeed, in a variety of contexts, Congress and state governments have acted to protect the privacy of personal information. The Buckley Amendment, also known as the Family Educational Rights and Privacy Act (“FERPA”), prohibits an educational institution from publicly releasing either academic or disciplinary records without the consent of the student.<sup>24</sup> Violations of the Act are punishable with the offending institution’s loss of all federal education funds.<sup>25</sup> Similarly,

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19. Cate, *supra* note 2, at 175-76.

20. *Id.* at 178.

21. Cf. James Lardner, *I Know What You Did Last Summer—and Fall*, U.S. NEWS & WORLD REP., Apr. 19, 1999, at 55 (reporting that “[c]orporate America is mobilizing against the threat of a broad federal privacy-protection law.”).

22. See RESTATEMENT (SECOND) OF TORTS, § 652D (1965); see also Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TULANE L. REV. 173, 198-203 (1998) (describing the nature and scope of the “private facts tort”).

23. It is true that, as to media disclosures, the Supreme Court has severely limited the potential applicability of the private facts tort. See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); Lidsky, *supra* note 22, at 200-01. Of course, those collecting private information of the sort to which Professor Cate is advertizing have absolutely no intention of publishing their lists—doing so would destroy the economic value of the database. Rather, information brokers seem much more analogous to Dun & Bradstreet, a financial reporting service, which did not generally make its analyses available to the general public. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

24. See 20 U.S.C. § 1232g (1994).

25. See § 1232g(a).

most states have enacted statutes protecting the identity of persons tested for the AIDS virus.<sup>26</sup> One can imagine all sorts of marketing opportunities associated with a such a list—everything from birth control devices to viatical settlement plans might be direct-marketed to persons having taken an AIDS test. For better or worse (in my view for better), those providing such test services cannot profit by selling the names of clients to entities wishing to direct-market to them, even if they maintain a database containing the names of such persons.

Viewed from this perspective, the only real question is whether Congress, state legislatures, and state supreme courts will act to protect us from one of the more profoundly negative consequences of living in the information age. Professor Cate, however, does not think that such legislation could be enacted and enforced constitutionally: “In the United States, however, the government is constitutionally prohibited under the First Amendment from interfering with the flow of information, except in the most compelling circumstances.”<sup>27</sup> For the reasons set forth below, I think he is unduly pessimistic about the possibility of securing appropriate legislation protecting private facts from public disclosure. That said, I am far from convinced that government will act to protect the citizenry’s reasonable expectations of privacy.<sup>28</sup>

## II. REASONABLE FEDERAL OR STATE LEGISLATION PROTECTING AN INDIVIDUAL’S PRIVACY WOULD BE CONSTITUTIONAL

Professor Cate argues that efforts to protect personal information are somehow doomed by the First Amendment right of those collecting such information to disseminate it, or alternatively that such regulation might raise serious issues under the Takings Clause.<sup>29</sup> Notwithstanding Professor Cate’s objections, with respect to average citizens living average lives, the government could, if it wished, secure a great deal more information against commodification and sale than present law protects.

Moreover, one reasonably could take strong issue with Professor Cate’s view that markets will sufficiently protect private information from commodification and sale.<sup>30</sup> In most instances, disparities of bargaining power will make it

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26. See, e.g., *Doe v. Shady Grove Adventist Hosp.*, 598 A.2d 507, 514 (Md. Ct. Spec. App. 1991) (upholding request for plaintiff’s name to remain under seal in lawsuit alleging that hospital breached a duty to hold the results of an AIDS test confidential); CAL. HEALTH & SAFETY CODE §§ 120975-121020 (Supp. 1999); MASS GEN. L. ch. 111, § 70F (1992); TEX. HEALTH & SAFETY CODE ANN. § 81.103 (Vernon 1992).

27. Cate, *supra* note 2, at 179-80.

28. See Lardner, *supra* note 21, at 55 (reporting that “corporate lobbyists have sold Republican and Democratic leaders alike on the view of the Internet economy as a tender, if vital, young thing needing protection from, in the words of George Vradenburg, senior vice president for global and strategic policy of America Online, ‘the regulatory mechanisms of the past.’”).

29. See Cate, *supra* note 2, at 196-225.

30. See *id.* at 225 (“In those and similar situations, the law provides important but carefully circumscribed, basic privacy rights, the purpose of which is to facilitate—not interfere with—the

difficult, if not impossible, for individual citizens to demand that service providers or merchants refrain from distributing highly personal information. As one commentator has wryly observed, reliance on market mechanisms and self-regulation to protect privacy is tantamount to “putting Count Dracula in charge of the blood bank.”<sup>31</sup>

Accordingly, government action is needed to secure basic privacy rights. Just as the National Labor Relations Act was necessary to ensure parity of arms in negotiations between workers and management, so too legislation is needed to secure parity of bargaining power between the general public and the new information brokers. If left to the market, working class Americans would be at a considerable disadvantage in disputes with management over the terms and conditions of their employment,<sup>32</sup> if left to the market, basic expectations of privacy will not be routinely honored.<sup>33</sup> Just as laborers are free to waive their collective bargaining rights, individuals might choose to waive privacy protections. The existence of privacy protections should not, however, be left to the tender mercies of the market (just as basic rights to collective bargaining should not be, and are not, left to market forces).<sup>34</sup>

#### A. *The First Amendment*

Professor Cate argues that the Free Speech and Press Clauses of the First Amendment would preclude the adoption of reasonable privacy legislation.<sup>35</sup> His position overstates the First Amendment value of facilitating open markets in highly confidential information about non-public figures that does not implicate matters of public concern. Simply put, the First Amendment value in distributing highly personal information about average citizens is, at best, very low.<sup>36</sup> For example, the First Amendment value in permitting an insurance company to sell an average citizen’s medical records is slight. The medical records of a sitting President might present a harder question; the President is the ultimate “public figure,” and the condition of his health is, at least arguably, a matter of public

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development of private mechanisms and individual choice as the preferred means of valuing and protecting privacy.”); *cf.* Berman & Mulligan, *supra* note 4, at 563-79 (describing the market’s failure adequately to protect reasonable privacy expectations and proposing legislative remedies to correct these market failures).

31. Lardner, *supra* note 21, at 56 (quoting Stephen Lau, Hong Kong’s “privacy commissioner”).

32. For an example of how markets treated workers in one sector of the economy at the turn of the last century, see UPTON SINCLAIR, THE JUNGLE (1906).

33. See, e.g., Streifeld, *supra* note 4, at 1, 11 (reporting on Amazon.com’s practice of publishing information about customers’ buying habits without the overt and freely-given consent of its customers).

34. See Berman & Mulligan, *supra* note 4, at 571-79.

35. See Cate, *supra* note 2, at 203-05.

36. See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985).

concern.<sup>37</sup> In this regard, one should keep in mind that the Supreme Court's efforts to protect the free flow of information generally have been limited to information about public figures or matters of public concern. Purely private matters relating to non-public figures are not the subject of serious First Amendment protection.<sup>38</sup> Hence, if John falsely tells his co-workers that Jane has syphilis, John will be liable in tort for defamation for his slanderous statement about Jane. If Jane is a non-public figure and her health status is not a matter of public concern, Jane need only show that the statement was false and was "of and concerning" her. Indeed, in most states, stating that someone has a "loathsome" disease is slanderous per se, and damages are presumed at law.<sup>39</sup>

Professor Cate is correct, of course, in noting that vast areas of state tort law have been constitutionalized by *New York Times Co.*<sup>40</sup> and its jurisprudential progeny.<sup>41</sup> He argues that "when information is true and obtained lawfully, the Supreme Court has repeatedly held that the state may not restrict its publication without showing a very closely tailored, compelling government interest."<sup>42</sup> State tort law has not, however, been entirely displaced by First Amendment values. Indeed, Dun & Bradstreet's inaccurate assertion that a construction company had filed for bankruptcy led to a judgment for damages against Dun and Bradstreet. Predictably, Dun & Bradstreet argued that the mistake should not give rise to liability, except under the "actual malice" standard of *New York Times Co.*<sup>43</sup>

The Supreme Court correctly rejected Dun & Bradstreet's First Amendment defense. Writing for the plurality, Justice Powell explained that an inaccurate credit rating neither implicated a public figure nor a matter of public concern.<sup>44</sup> He also noted that the Supreme Court has "long recognized that not all speech is of equal First Amendment importance."<sup>45</sup> More specifically, "speech on matters of purely private concern is of less First Amendment concern" than speech related to the project of democratic self-governance.<sup>46</sup>

Moreover, Justice Powell emphatically rejected Dun & Bradstreet's argument that the dissemination of credit reports constituted an important enterprise related to matters of public concern: "There is simply no credible

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37. See U.S. CONST. amend. XXV.

38. See *Dun & Bradstreet*, 472 U.S. at 762-64.

39. See RESTATEMENT OF TORTS § 570 (1938).

40. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

41. See Cate, *supra* note 2, at 203-05.

42. *Id.* at 204.

43. See *Dun & Bradstreet*, 472 U.S. at 751. This standard requires a plaintiff to show that the defendant not only published a false and damaging statement about the plaintiff, but that it did so either with actual knowledge of its falsity or in reckless disregard of its truth or falsity. See also *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988).

44. See *Dun & Bradstreet*, 472 U.S. at 760, 762.

45. *Id.* at 758.

46. *Id.* at 759; see ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22-27 (1948).

argument that this type of credit reporting requires special protection to ensure that ‘debate on public issues will be uninhibited, robust, and wide open.’”<sup>47</sup>

Justices Rehnquist and O’Connor joined Justice Powell’s opinion, and Chief Justice Burger and Justice White concurred in the judgment—including Justice Powell’s rejection of any special First Amendment protection for credit reports.<sup>48</sup>

The reasoning of *Dun & Bradstreet* strongly suggests that the states are far from powerless to prevent the unauthorized collection and distribution of personal information when such collection and distribution is potentially harmful to the subjects of the information. Accordingly, the state of Vermont was free to impose liability on any standard requiring a showing of fault.

Although one should be cautious against reading too much into *Dun & Bradstreet*, the case seems to support the proposition that state legislatures and the Federal Congress could enact legislation that protects private information from collection and/or disclosure without the permission of the person about whom the information relates.<sup>49</sup> The specific information in *Dun & Bradstreet*

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47. *Dun & Bradstreet*, 472 U.S. at 762 (quotations and citation omitted); see MEIKLEJOHN, *supra* note 46, at 24-25.

48. See *Dun & Bradstreet*, 472 U.S. at 763-64 (Burger, C.J., concurring); *id.* at 765-74 (White, J., concurring).

49. Professor Cate correctly notes that the Supreme Court “has struck down laws restricting the publication of confidential public reports, and the names of judges under investigation, juvenile suspects, and rape victims.” Cate, *supra* note 2, at 204 (citations omitted). These precedents may not support his broader argument, however. For example, *New York Times Co. v. United States*, 403 U.S. 713 (1971), a.k.a. “The Pentagon Papers Case,” involved an executive order (not a statute) against publication of “information whose disclosure would endanger the national security,” based on “the constitutional power of the President over the conduct of foreign affairs and his authority as Commander-in-Chief” (*not* the imposition of liability after the fact, pursuant to statutory law). See *id.* at 718 (Black, J., concurring). Several justices were quite careful to emphasize this very point. See *id.* at 727-31 (Stewart, J., concurring); *id.* at 731-40 (White, J., concurring); *id.* at 743-48 (Marshall, J., concurring). Cases involving public officials or matters of public concern are also inapposite. See *Dun & Bradstreet*, 472 U.S. at 756-63. This leaves *Florida Star*, the case involving publication of a rape victim’s name in violation of a state statute. See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

Although *Florida Star* might raise some questions regarding restrictions on the print media’s publication of such materials, in the absence of publication, one reasonably could be skeptical that *Florida Star* would necessarily govern. Indeed, given that *Florida Star* involved criminal charges in the public courts, it would be very easy to limit the reasoning of the case and its precedential value, given the Supreme Court’s consistent practice of requiring that the press enjoy reasonable access to public court proceedings and the right to report on such proceedings. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976). The Supreme Court has been much less receptive to claims involving a right to gather information, when the information gathering techniques violate laws of general applicability. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984); *Branzburg v. Hayes*, 408 U.S. 665 (1972). The Supreme Court also has permitted the imposition of liability on the press for breaching a promise of confidentiality on general principles of state tort and/or contract law. See *Cohen v. Cowles*

was, of course, false, and therefore outside Professor Cate's assertion about the nature of contemporary First Amendment law. Nevertheless, the states or Congress could enact privacy-protection laws that limit the legal means of obtaining information about non-public figures involving matters that are not of public concern.<sup>50</sup>

Take, for example, the information associated with the processing of health insurance claims. If Indiana wished to enact a statute prohibiting the transfer of such information without a patient's consent, it is difficult to believe that the First Amendment would prevent the enforcement of such a law.<sup>51</sup> That is to say, the state could enact legislation that precludes an insurance company or HMO from disclosing such information without a patient's or plan participant's prior consent.

In many respects, laws shielding the identity of persons testing positive for AIDS are similar in nature. In order to encourage persons to seek testing and treatment for HIV, many communities have adopted privacy laws that prohibit the disclosure of test results to anyone but the patient.<sup>52</sup> The First Amendment does not preclude state or local governments from preventing testing agencies from selling lists of persons who tested positive for the virus.

Although a privacy law protecting the confidentiality of medical records more generally would be significantly broader in scope, such legislation would not necessarily fail judicial review. The core concern of the First Amendment is democratic self-governance, not the marketing of medical goods or services.<sup>53</sup>

It also seems self-evident that protection of commercial speech does not necessarily imply a right to disclose otherwise confidential information. "Drink Coca-Cola" is quite different from buying a list of persons with halitosis and mailing them information on "The Halitosis Connection Dating Service" (the "HCDS"). Although HCDS could undoubtedly advertise its services without government censorship, its ability to collect and use confidential private information incident to such marketing efforts presents a very different question.

Let me be clear: I am not suggesting that privacy rights exist independent of particular statutory protections. Thus, if Blue Cross/Blue Shield decided to sell Halitosis Connection a list of persons receiving reimbursements or subsidies for drugs associated with treating halitosis, there would be no impediment to the transaction absent some positive legislation. In this sense, Professor Cate is quite correct to assert that, absent some positive law delimiting the right to obtain or distribute particular information, Blue Cross/Blue Shield would be perfectly

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Media Co., 501 U.S. 663 (1991); *see also* Lidsky, *supra* note 22, at 184-93, 200-01.

50. See Lidsky, *supra* note 22, at 203-26 (arguing that legal limits on newsgathering techniques are consistent with the First Amendment and suggesting the tort of intrusion as an appropriate device to limit intrusive newsgathering techniques).

51. See *Branzburg v. Hayes*, 408 U.S. 665 (1972); *see also* *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

52. See sources cited *supra* note 25.

53. See *MEIKLEJOHN*, *supra* note 46, at 25-27.

entitled to sell lists of persons with halitosis to would-be marketers.<sup>54</sup> As against purely private companies, privacy protections exist only by operation of legislation creating privacy interests.<sup>55</sup> That said, a rational legislature could conclude that certain information is sufficiently personal to warrant the protection of legislation (i.e., statutes protecting the identities of persons testing positive for HIV, tuberculosis, or other communicable and socially stigmatizing diseases).<sup>56</sup>

With regard to lawyer solicitations, the U.S. Supreme Court has upheld complete bans on in-person solicitations and even permitted the imposition of time delays before written solicitations can be mailed to the victims of accidents and disasters.<sup>57</sup> In upholding restrictions on truthful, non-misleading written solicitations, the Court credited Florida's interest in protecting accident victims from the trauma of vulture-like lawyer behavior; the lawyer's interest in communicating truthful information to potential plaintiffs was insufficient to outweigh a kind of privacy interest on the part of victims.<sup>58</sup>

The Florida Bar expressly defended the prohibition on soliciting disaster victims on privacy grounds: "The Florida Bar asserts that it has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers."<sup>59</sup> The Supreme Court had "little trouble crediting the Bar's interest as substantial," explaining that "[o]ur precedents leave no room for doubt that 'the protection of potential clients' privacy is a substantial state interest.'"<sup>60</sup>

One should note that, like Justice Powell in *Dun & Bradstreet*, Justice O'Connor emphasized that the scope of First Amendment protection is intrinsically related to the nature of the speech at issue. Hence, "[t]here are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer."<sup>61</sup> According to the majority, direct mail solicitations to the victims of disasters and their families fell well outside this category of speech activity.<sup>62</sup> Although one might question whether the trauma of receiving a lawyer's solicitation letter is as great as Justice O'Connor seems to believe, the logic of *Went For It* should squarely apply to legislation aimed at protecting the

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54. See Lidsky, *supra* note 22, at 193-98; see also S. Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825, 832-38, 862-66, 879-86 (1998) (describing the absence of privacy protections against non-governmental employees and proposing federal legislation to extend reasonable privacy protections to employees of non-governmental employers).

55. See Wilborn, *supra* note 54, at 879-87.

56. See *id.* at 876-83.

57. See *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995).

58. See *id.* at 624-26, 634-35.

59. *Id.* at 624.

60. *Id.* at 625 (quoting *Edenfield v. Fane*, 507 U.S. 761, 769 (1993)).

61. *Id.* at 634.

62. See *id.* at 635.

confidentiality of highly personal information.

Indeed, if Professor Cate is correct, educational institutions should be free to sell information regarding their students' academic progress. Undoubtedly, Stanley Kaplan or some other entity offering tutoring services would appreciate a list of students currently on the brink of academic probation. Of course, the Buckley Amendment would prevent Indiana University from selling such information to Stanley Kaplan. Professor Cate, however, seems to be of the view that a law largely identical to the Buckley Amendment would potentially violate the First Amendment.<sup>63</sup> I think it very doubtful that a reviewing court would absolve Indiana University of liability under the Buckley Amendment if this school's dean, Norman Lefstein, elected to sell student academic records to would-be marketers. The analysis should not be any different just because an Internet service provider happens to be the information broker.

Professor Cate responds that the Supreme Court has never upheld limits on the dissemination of truthful speech.<sup>64</sup> As he puts it, "all of the cases [Professor Krotoszynski] puts forward as supporting government restraints on information involve false expression."<sup>65</sup> This is simply not true: *Went for It* upholds limitations on truthful, non-misleading commercial speech by lawyers in order to vindicate important privacy interests.<sup>66</sup> Justice O'Connor's opinion in *Went for It* expressly balances the community's interest in privacy against the value of certain commercial solicitations by lawyers and holds that the State of Florida may constitutionally strike a balance in favor of privacy at the expense of commercial speech (at least in some circumstances).<sup>67</sup> Professor Cate is free to lament this turn in the Supreme Court's free speech jurisprudence, but it does not seem reasonable simply to deny the existence of the precedent *Went For It* establishes in this field.<sup>68</sup>

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63. See Cate, *supra* note 2, at 203-05.

64. See *id.* at 173 n.\*.

65. *Id.*

66. See *supra* notes 57-62 and accompanying text.

67. See *Went For It*, 515 U.S. at 634-35.

68. Although one should normally abjure attempting to predict the future, the Supreme Court's decision in *Wilson v. Layne*, 119 S. Ct. 1692 (1999), has potential relevance to the First Amendment questions that Professor Cate's article raises. In *Wilson*, the Supreme Court held that local and federal law enforcement officers could not constitutionally invite media representatives to participate in "ride along" activities that included filming at the homes of persons subject to a lawful arrest warrant. See *id.* at 1697-99. Chief Justice Rehnquist, speaking for a unanimous court (at least on this point), explained that the Fourth Amendment's protection of privacy precludes law enforcement officials from facilitating the filming of the execution of arrest warrants over the objections of the arrestees. "We hold that it is a violation of the Fourth Amendment for police to bring members of the media or third parties into a home during the execution of a warrant when the presence of third parties in the home was not in aid of the execution of the warrant." *Id.* at 1699. Along the way, the Court rejected a First Amendment defense of the practice of media ride-alongs, explaining that "the Fourth Amendment also protects a very important right, and in the present case it is in terms of that right that the media ride-alongs must be judged." *Id.* at 1698. On the facts at

### B. The Takings Clause

In the alternative, Professor Cate argues that the Takings Clause would raise serious constitutional problems for legislation designed to vest individual citizens with the right to control access to personal information gathered by doctors, creditors, or educational institutions: “Data protection regulation may legitimately prompt takings claims.”<sup>69</sup> According to Professor Cate, “[a] data processor exercises property rights in his data because of his investment in collecting and aggregating them with other useful data.”<sup>70</sup> He concludes that “[a] legislative, regulatory, or even judicial determination that denies processors the right to use their data could very likely constitute a taking and require compensation.”<sup>71</sup> All that said, whether or not particular information belongs to the entity that collects it seems to be something about which reasonable legislative minds might disagree.<sup>72</sup>

The Takings Clause only protects property interests; property, in turn, exists at the sufferance of state governments. The Supreme Court consistently has refused to recognize property interests arising directly under the Constitution.<sup>73</sup> This approach is probably mistaken; if liberty interests arise directly under the

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issue in *Wilson*, the citizen’s interest in privacy simply outweighed any First Amendment benefits that the practice of media ride-alongs might provide. A similar analysis should govern in a case presenting a challenge to reasonable privacy legislation. See, e.g., *Cable News Network v. Noriega*, 917 F.2d 1543 (11th Cir.) (balancing CNN’s right to broadcast the Noriega tapes against General Noriega’s Sixth Amendment interest in a fair trial), cert. denied, 498 U.S. 976 (1990); cf. id. at 976-77 (Marshall, J., dissenting from the denial of a writ of certiorari).

69. *Id.* at 207.

70. *Id.* at 208.

71. *Id.*

72. For example, one might assume that one owns her own body, its parts, and the DNA that controlled the creation of those parts. The California Supreme Court did not so view the matter. See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990), cert. denied, 499 U.S. 936 (1991). That said, one could easily imagine a decision going the other way (which is precisely how the intermediate California appellate court had ruled). See *Moore v. Regents of the Univ. of Cal.*, 249 Cal. Rptr. 494 (Ct. App. 1988), rev’d, 793 P.2d 479 (Cal. 1990); see also William Boulier, Note, *Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693 (1995); Michelle Bourianoff Bray, Note, *Personalizing Personality: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209 (1990). The Takings Clause would not require compensation to either losing party; the state is free to establish a property right in either the patient or the hospital, and the creation of that property right does not raise any serious Takings Clause issue. It is possible that the decision might raise substantive due process concerns if the court’s (or legislature’s) decision seemed utterly irrational or arbitrary. See Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555 (1997).

73. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972) (holding that property interests, unlike liberty interests, arise only by operation of positive law and requiring a would-be plaintiff to establish a “legitimate claim of entitlement” under existing state law to demonstrate a cognizable property interest in a government job or benefit).

Constitution, it stands to reason that the Constitution also should limit the states' ability to extinguish or define away the existence of property rights.<sup>74</sup> Nevertheless, the Supreme Court, in a variety of contexts, has made clear that property interests arise only by operation of positive law; what the state giveth, the state can taketh away (at least prospectively).<sup>75</sup>

A state legislature could simply pass legislation declaring that no property interest accrues from the collection of personal data. Thus, if a Kroger elects to track its customers' grocery purchases, it would be free to do so.<sup>76</sup> If it attempted to assert a regulatory takings claim in response to state legislation prohibiting it from selling such a list, the claim would fail because the Takings Clause only applies in instances where a property interest has been implicated.

Indiana is particularly instructive in this regard. For reasons that are non-obvious, the state legislature passed a cap on actual damages resulting from medical malpractice. No matter what the plaintiff's actual damages, a plaintiff cannot recover more than \$1.25 million.<sup>77</sup> The Supreme Court of Indiana sustained this law on a broad-based constitutional attack, including claims arising under the due process and equal protection clauses.<sup>78</sup>

Indiana has effectively revoked the property (or liberty) interest that one has in physical integrity. The legislature snatched a stick from the citizen's bundle of property rights (evidently when not many citizens were looking, or at least failed to appreciate the gravamen of this law).<sup>79</sup> If positive law can deny a citizen the ability to recover for damages to her person due to negligence, it seems logically to follow that the state could define away Kroger's property interest in its customer database.

Indeed, a sufficiently privacy-loving legislature could go one step further and enact legislation creating an individual property interest in one's confidential personal information and authorizing actions for damages when such information is released without the consent of the person about whom the information relates. It is easy to imagine such a law.

Consider the parallel fates of Monica Lewinsky, Justice Clarence Thomas, and Judge Robert Bork. Independent Counsel Kenneth Starr attempted to force Kramerbooks and Barnes & Noble, two Washington, D.C. bookstores, to disclose

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74. See Krotoszynski, *supra* note 72, at 583-90, 615-25.

75. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Punikaia v. Clark*, 720 F.2d 564, 566 (9th Cir. 1983), *cert. denied*, 469 U.S. 816 (1984).

76. Many grocery stores can and do collect data on their customers, most commonly through "frequent shopper" programs that involve identification cards that permit the store to track a customer's purchasing patterns. See Lena H. Sun, *Checking Out the Customer*, WASH. POST, July 9, 1989, at H1.

77. See IND. CODE § 34-18-14-3(a)(3) (1998).

78. See *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 598-601 (Ind. 1980); see also Frank Cornelius, *Crushed by My Own Reform*, N.Y. TIMES, Oct. 1, 1994, at A31; Krotoszynski, *supra* note 72, at 610 n.344.

79. See Cornelius, *supra* note 78.

Ms. Lewinsky's recent purchases.<sup>80</sup> Opponents of Justice Thomas's appointment to the Supreme Court and Judge Bork's nomination to the Supreme Court sought and obtained information regarding their video rental habits,<sup>81</sup> which, in the case of Justice Thomas, ostensibly included some relatively racy titles.<sup>82</sup> A state legislature could easily conclude that customers of video rental establishments should be able to assert a privacy claim against the disclosure of their rental records without consent.<sup>83</sup> The Supreme Court probably would not strike down such legislation on either First Amendment or Takings Clause grounds. Similarly, an insurance company's claim to a proprietary interest in an insured person's medical history also is something that a rational state legislature could reject, probably without encountering serious constitutional difficulties.

Professor Cate responds that the Congress and state legislatures are powerless to adopt legislation that upsets "reasonable investment-backed expectations," citing *Ruckelshaus v. Monsanto Co.*<sup>84</sup> in support of this proposition.<sup>85</sup> He fails to mention the Supreme Court's explicit reliance on the existence of a pre-existing property right under Missouri law as a necessary incident of invoking the Takings Clause. As Justice Blackmun explains in *Monsanto*, "we are mindful of the basic axiom that 'property interests . . . are not created by the Constitution. Rather, they are created and their dimensions defined by existing rules or understandings that stem from an independent source

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80. See David Stout, *Lewinsky's Bookstore Purchases Are Now Subject of Subpoena*, N.Y. TIMES, Mar. 26, 1998, at A1 (reporting on Independent Counsel Kenneth Starr's efforts to force two Washington, D.C. bookstores to divulge Monica Lewinsky's book purchases over the previous 28 months and the bookstores' decision to fight Starr's subpoena); David Streitfeld & Bill Miller, *Starr's Quest for Book Titles Faces High Bar*, WASH. POST, Apr. 10, 1998, at B1 (same).

81. See Amitai Etzioni, *Privacy Isn't Dead Yet*, N.Y. TIMES, Apr. 6, 1999, at A5 (describing how Judge Bork's experience led to adoption of the Video Privacy Protection Act, 18 U.S.C. § 2710); Michael deCourcy Hinds, *Personal But Not Confidential: A New Debate over Privacy*, N.Y. TIMES, Feb. 27, 1988, at 56 (providing an account of Judge Bork's experience and the uproar that followed); Jeffery Yorke, *The Call-In People's Court*, WASH. POST, Oct. 29, 1991, at C7 (reporting on rumors that Justice Thomas rented pornographic video tapes from Graffiti's, a Washington, D.C. video rental store).

82. See Yorke, *supra* note 81.

83. Indeed, Congress has already passed such legislation in response to Judge Bork's experience of having his viewing habits put on public display incident to his confirmation hearings. See The Video Privacy Protection Act, 18 U.S.C. § 2710 (providing both criminal and civil penalties for disclosing any "personally identifiable information" about a video rental store patron absent the patron's prior written consent). Although case law under the Video Privacy Protection Act is scant, at least one civil suit has gone forward, without any serious First Amendment challenge to the law. See *Dirkes v. Borough of Runnemede*, 936 F. Supp. 235 (D.N.J. 1996) (permitting a civil action pursuant to the Video Privacy Protection Act to move forward against both a video rental store and third parties who distributed the Dirkes' video rental records).

84. 467 U.S. 986 (1984).

85. See Cate, *supra* note 2, at 173 n.\*.

such as state law.”<sup>86</sup> Thus, Monsanto’s takings claim was entirely contingent on Missouri law affirmatively recognizing a property interest in trade secrets, including the specific data at issue in the case.

After examining the matter in some detail, Justice Blackmun concludes that “[w]e therefore hold that to the extent that Monsanto has an interest in its health, safety, and environmental data cognizable as a trade secret property right under Missouri law, that property right is protected by the Takings Clause of the Fifth Amendment.”<sup>87</sup> The contingent nature of the takings claim on the substance of Missouri state law could not be more clear, or more expressly stated. If Missouri modified its substantive law to abolish the property interest in trade secrets, it would preclude a takings claim identical to the claim raised by Monsanto for data assembled after the new law’s effective date. The *Monsanto* Court’s subsequent discussion of “reasonable investment-backed expectations” takes place against this backdrop of state positive law, and is entirely contingent on Missouri’s decision to recognize a property interest in the data at issue.<sup>88</sup>

To put the matter in some context, consider Congress’s recent decision to extend the life of copyrights from the life of the author plus fifty years to the life of the author plus seventy years.<sup>89</sup> Simply put, in 1998 Congress enacted legislation extending by twenty years the life of copyrights. If Congress were so inclined, it could have reduced the term of copyrights to two years, or set the term at any point it deemed prudent.<sup>90</sup> Even if such legislative action upset “reasonable investment-backed expectations,” such a law would not trigger the Takings Clause, at least insofar as the law purported to have merely prospective effect. Since 1937, the Supreme Court has not attempted to establish substantive limits on the powers of the state and federal governments to tinker prospectively with the content or scope of property rights. Accordingly, adoption of state laws prospectively limiting the ability of information scalpers to collect and sell personal information would not exceed the meager limits imposed on such policies by the substantive aspect of the Due Process clause.<sup>91</sup>

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86. *Monsanto*, 467 U.S. at 1001 (quoting *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 166 (1980)). *Webb’s Fabulous Pharmacies, Inc.*, in turn, quoted language from *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

87. *Monsanto*, 467 U.S. at 1003-04.

88. See *id.* at 1004-16.

89. Compare the 1976 version of 17 U.S.C. § 302(a) (“Copyright in a work created on or after January 1, 1978 subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and fifty years after the author’s death.”), with 17 U.S.C. § 302(a) (Supp. IV 1998) (“Copyright in a work created on or after January 1, 1978 subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author’s death.”)

90. See U.S. Const. art. I, § 8, cl. 8 (“The Congress shall have the power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

91. Cf. *Lochner v. New York*, 198 U.S. 45 (1905) (holding that economic liberty guaranteed by the Due Process clause precluded New York from adopting health and safety

To be sure, it is certainly possible that market mechanisms *might* incent video rental stores or bookstores to promise confidentiality in order to attract privacy-minded customers.<sup>92</sup> Nevertheless, the citizenry should not be forced to rely solely on the market to protect its privacy interests. After all, neither the First Amendment nor the Takings Clause is a mutual suicide pact. Properly understood, neither provision presents a serious impediment to the adoption of reasonable privacy legislation.<sup>93</sup>

### C. Conditional Spending and Privacy Rights

Let us suppose, for the moment, that one would be wrong to think that the First Amendment and/or the Takings Clause, properly construed, would permit a state to adopt legislation protecting the privacy interests of its citizens. Even if one supposes that the First Amendment and/or the Takings Clause preclude direct privacy protections, a sufficiently privacy-loving state government (or the federal government) could nevertheless prevent a good deal of private information from being commodified and sold like bags of potatoes.<sup>94</sup>

When the government elects to subsidize the delivery of particular goods or services, it may condition its willingness to do business with potential providers of goods or services on those providers agreeing to particular terms or conditions. For example, the receipt of federal family planning funds might be conditioned on the recipient clinic refusing to provide *any* meaningful information about abortion services.<sup>95</sup> Similarly, the decision to fund particular kinds of art does

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regulations governing maximum weekly hours of employment in a bakery); *Truax v. Corrigan*, 257 U.S. 312 (1921) (invoking the Due Process clause to impose substantive limits on Arizona's ability to define the scope of property rights associated with ownership of a restaurant).

92. Scott McNealy, chairman and CEO of Sun Microsystems, has stated publicly that “[y]ou already have zero privacy—get over it.” Etzioni, *supra* note 81, at 27. If Mr. McNealy’s approach is representative of the Internet industry’s attitudes toward privacy issues, I seriously question whether reliance on market mechanisms will prove sufficient to protect reasonable privacy expectations. See, e.g., Streitfeld, *supra* note 4.

93. Indeed, the Clinton administration has recently issued proposed regulations governing access to individual medical records. See Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59,918 (proposed Nov. 3, 1999); see also Robert Pear, *Clinton to Unveil Rules to Protect Medical Privacy*, N.Y. TIMES, Oct. 27, 1999, at A1 (“The Proposed regulations would be the first comprehensive Federal standards specifically intended to protect the confidentiality of medical records.”). The President proposed the new rules because Congress failed to meet a self-imposed statutory deadline for enacting legislation in this area. See Pear, *supra*. The proposed rules have proven controversial, and their ultimate fate remains uncertain. See Robert Pear, *Rules on Privacy of Patient Data Stir Hot Debate*, N.Y. TIMES, Oct. 30, 1999, at A1.

94. See generally Berman & Mulligan, *supra* note 4, at 571-79.

95. See *Rust v. Sullivan*, 500 U.S. 173 (1991); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1412 (1989); cf. William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

not imply that the government must fund all kinds of art.<sup>96</sup>

The federal and state governments are among the largest purchasers of medical services. Literally billions of dollars pass through the Medicare and Medicaid programs. Either the federal or a state government could condition participation in the Medicare and Medicaid programs on respecting the privacy interests of plan participants, perhaps by not disclosing patient information to third parties without prior patient consent. A health care provider who wished to create and sell patient lists would remain free to do so, provided, of course, that it did not take Medicare or Medicaid funds.

A similar sort of arrangement protects student grade and disciplinary records from public disclosure. If I were to locate and publish Dan and Marilyn Quayle's transcripts from this law school, the law school's continued participation in *all* federal educational programs would be jeopardized (notably including student loan programs).

All of this is a rather round about way of saying that, if government has the will to protect confidential personal information, multiple avenues of potential relief exist. The failure of the federal and state governments to protect such information adequately to date has a great deal more to do with the lobbying power of those who profit by trading in such information than with the weakness of the legal tools at the government's disposal.

### III. THE NEED TO RETHINK THE PUBLIC/PRIVATE DICHOTOMY IN THE CONTEXT OF PRIVACY RIGHTS

At a more theoretical level, Professor Cate's article raises, rather squarely, the age old question of precisely where to draw the line between the government and the private sector. Historically, the private sector has been free to disregard the constitutional limitations applicable to the government. Thus, the City of Indianapolis could not fire an employee for subscribing to the political goals of the National Organization for the Reform of Marijuana Laws ("NORML"), whereas IBM could do so. The theory behind this result is that the state presents a far greater threat to liberty than does the private sector.

If the Framers had foreseen the advent of Microsoft, one might question whether they would have created a system that assumes that only the government is the enemy of liberty.<sup>97</sup> As Professor Owen Fiss has argued in various contexts, in contemporary times, the state can be as much the friend of individual liberty as its enemy.<sup>98</sup> This is doubly so when one contrasts government efforts to enhance personal liberty through progressive legislation with the liberty-squelching behavior of large corporate interests.<sup>99</sup>

At least arguably, the creation of new and vast capabilities to create and

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96. See *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

97. See Wilborn, *supra* note 54, at 828-31, 864-76.

98. See Owen M. Fiss, *Silence on the Street Corner*, 26 SUFFOLK U. L. REV. 1 (1992).

99. See Scott Edwin Sundby, *Is Abandoning State Action Asking Too Much of the Constitution?*, 17 HASTINGS CONST. L.Q. 139, 144 n.11 (1989).

disseminate data make the private sphere even more potentially threatening to individual liberty.<sup>100</sup> If this is so, legal academics, judges, and legislators should rethink the wisdom of limiting basic privacy protections to the government. Of course, the extension of privacy protections to non-state actors, like Anthem or Blue Cross/Blue Shield, would require positive legislation. If the community concludes that the principal contemporary threat to individual liberty is the collection and dissemination of intensely personal information by private information brokers, then it would be entirely appropriate to rethink the wisdom of maintaining the public/private distinction in this particular area.

### CONCLUSION

I am not a great fan of the new information age—I am not yet convinced that “faster, cheaper, better” will mean that we live qualitatively better, more fulfilling lives.<sup>101</sup> Professor Cate’s article presents a rather nightmarish scenario in which our very souls can be digitized, commodified, and sold to the highest bidder. If this is truly the import of the information age, one should question whether we are not losing a great deal more than we are gaining in the bargain.

Nevertheless, there is no stopping the information revolution. China has tried and failed.<sup>102</sup> The ubiquity of technology means that, like it or not, we will all have to readjust our lives to accommodate new technological realities. One must hope, however, that the federal courts resist the temptation to “*Lochner-ize*” the info-bahn.

Some of the arguments contained in Professor Cate’s article could be deployed in an attempt to use the First Amendment and Takings Clause to create a kind of constitutional “liberty of contract” for information service brokers. Just as industrial production and the benefits of economies of scale led capitalists at the turn of the last century to reject social welfare legislation as an untenable interference with freedom of contract, it appears likely that similar arguments will be mustered on behalf of the information brokers. Just as the federal courts eventually came to realize that laws protecting men, women, and children from dangerous or unfair terms and conditions of employment were not unconstitutional, let us hope that federal and state courts do not interpose the Bill of Rights to thwart legislation and common law precedents designed to check the worst abuses of the new information brokers.

Markets failed to protect labor at the turn of the last century. There is every reason to believe that markets will fail to protect privacy at the turn of this

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100. See Berman & Mulligan, *supra* note 4, at 563-68.

101. See ANDREWS, *supra* note 18, at 248-60 (arguing that new biological technologies, including cloning, are not inherently beneficial or harmful, but require careful debate about ethics and culture before they are embraced).

102. See Scott E. Feir, Comment, *Regulations Restricting Internet Access: Attempted Repair of Rupture in China’s Great Wall Restraining the Free Exchange of Ideas*, 6 PAC. RIM L. & POL’Y J. 361 (1997).

century. History teaches that if there is money to be made by collecting highly personal information and selling it to the highest bidder, someone will undertake to provide this service—absent some legal impediment to doing so. Let us hope that the federal and state courts will take a lesson from the past and embrace, rather than reject, progressive legislation aimed at securing a modicum of personal privacy in the new information age.

# THE INTERNET IS CHANGING THE FACE OF AMERICAN LAW SCHOOLS

HENRY H. PERRITT, JR.\*

## INTRODUCTION

Information technology, especially as deployed in the Internet's World Wide Web ("the Web"), is changing the law, the functioning of legal institutions and the roles of lawyers. The Internet's potential for changing the face of American law schools is especially profound.

Legislatures, courts, and statutory bodies all over the world are discovering how a \$3000 Internet-connected computer can be a remarkably cheap legal printing press through which new statutes, court decisions and administrative regulations can be communicated instantly to anyone in the world. Thus used, the Internet is an engine of legitimacy for new political and legal institutions because they can communicate their work and their reasoning to their own citizens and the international community.

Readily available court decisions are necessary components of any rule of law that depends upon consistent decisionmaking. A low-cost personal computer ("PC") connected to the Internet becomes a virtual library through which a judge, legislator or government official can consult the laws of other jurisdictions and international bodies such as the European Commission, the European Court of Human Rights and the World Trade Organization. Such a virtual library makes legal harmonization possible.

The Internet also affords easier participation in political and legal processes. Legislatures and administrative agencies regularly publish proposed laws and regulations on the Web and solicit comment from interested persons.<sup>1</sup> Comments can be submitted by e-mail simply by clicking a link on the Web page. Internet connectivity eases the formation and maintenance of political action groups and Non-Governmental Organizations ("NGOs").<sup>2</sup> However, the Internet not only favors those seeking to change governmental policy or incumbent governments but also enables established governments to inform their constituencies of policies and the underlying rationales. When disputes arise, the Internet facilitates adjudication by making it easier to find court dockets, exchange litigants' materials<sup>3</sup> and file papers with judicial officers.<sup>4</sup>

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1. See, e.g., *National Telecommunications and Information Administration* (last modified June 1, 1999) <<http://www.ntia.doc.gov>> (soliciting comments on several telecommunication policies); *Federal Communications Commission* (visited July 13, 1999) <<http://www.fcc.gov>> (instructions on how to submit electronic comments).

2. See generally Henry H. Perritt, Jr., *Cyberspace and State Sovereignty*, 3 J. INT'L LEGAL STUD. 155 (1997); Henry H. Perritt, Jr., *The Internet and the Sovereign State: The Role and Impact of Cyberspace on National and Global Governance*, 5 IND. J. GLOB. LEG. STUD. 423 (1998).

3. See, e.g., *The Center for Information Law and Policy* (visited July 13, 1999)

The Internet is not only an instrument of legal procedure and political action; it is also a means of commerce.<sup>5</sup> Like other means of commerce, e-commerce gives rise to disputes which must be adjudicated.<sup>6</sup> Internet contracts, like any other contracts, sometimes lead to disappointed expectations and to breach-of-contract lawsuits. Statements made through Internet e-mail, offers made to consumers on Web sites, private data collected through electronic orders, pictures allegedly infringing copyright, and symbols allegedly infringing trademarks all give rise to tort and statutory disputes.<sup>7</sup> Sometimes these disputes arising in Cyberspace give rise to suggestions that new legal principles should be applied to resolve them because of the Internet's unique characteristics.<sup>8</sup> Such Cyberlaw proposals must be evaluated against claims that the Internet is a different medium for commercial transactions.

As commerce moves to the Web and the Internet, so do criminals. Fraud, forgery, extortion, and theft of property already are serious threats. To combat this intrusion effectively, law enforcement personnel, and the lawyers who advise and direct them, must be able to understand the details of crimes committed in Cyberspace.

For the potential of electronic legal publishing, virtual legal libraries and electronic democracy to be realized, lawyers performing judicial, parliamentary, and administrative functions must understand the Internet's potential and be knowledgeable about its use by other legal institutions around the world.

For practicing lawyers who advise or represent clients and for judges hearing Cyberspace disputes or criminal prosecutions, some knowledge of the new medium and of the legal issues it produces is necessary for professional effectiveness. One could go seriously astray in analyzing a judicial jurisdiction

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<<http://www.cilp.org>>.

4. See Henry H. Perritt, Jr., *Video Depositions, Transcripts and Trials*, 43 EMORY L.J. 1071 (1994).

5. See Janine S. Hiller & Don Lloyd Cook, *From Clipper Ships to Clipper Chips: The Evolution of Payment Systems for Electronic Commerce*, 17 J.L. & COM. 53 (1997); Kerry Lynn Macintosh, *How to Encourage Global Electronic Commerce: The Case for Private Currencies on the Internet*, 11 HARV. J.L. & TECH. 733 (1998); Henry H. Perritt, Jr., *Legal and Technological Infrastructures for Electronic Payment Systems*, 22 RUTGERS COMPUTER & TECH. L.J. 1 (1996).

6. See generally HENRY H. PERRITT, JR., *LAW AND THE INFORMATION SUPERHIGHWAY* (1996) (analyzing contract, tort, intellectual property, jurisdictional and various regulatory issues raised by the Internet).

7. See Maureen A. O'Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 MINN. L. REV. 609 (1998) (considering appropriate legal treatment of linking and framing); Henry H. Perritt, Jr., *Property and Innovation in the Global Information Infrastructure*, 1996 U. CHI. LEGAL F. 261 (1996); Dan Thu Thi Phan, Note, *Will Fair Use Function on the Internet?*, 98 COLUM. L. REV. 169, 173 (1998) (explaining why current or expanded fair-use concept is important for the Internet).

8. See Henry H. Perritt, Jr., *Cyberspace Self-Government: Town-Hall Democracy or Rediscovered Royalism?*, 12 BERKELEY TECH. L.J. 413 (1997); Josh A. Goldfoot, Note, *Antitrust Implications of Internet Administration*, 84 VA. L. REV. 909 (1998).

issue, for example, if one believed that a document requested from a website is necessarily physically present or necessarily is communicated through the Internet-connected computer from which it is requested. In fact, a request for a document, made by clicking an icon displayed by a Web server, often merely connects the requester's computer to a third computer containing the requested information. The third computer may be half way around the world from the computer originally contacted.

Those interested in developing a rule of law and an effective legal profession must think about how lawyers, judges, legislators and administrators will get the requisite knowledge.

It is the Internet, more than information technology in general, that offers the potential to do all these things. Focusing on frame relay, ATM (Asynchronous Transfer Mode), proprietary videoconferencing techniques, or on any other proprietary approach not closely linked to the TCP/IP and http protocols that define the Internet and the World Wide Web is a distraction. It is important to understand that what makes the Internet special in regard to law, legal institutions and legal education is its modular character and universality.

Before the Internet, one could distribute or acquire information by an electronic network, but one had to invest in establishing the network itself, invest in software at both ends of the connection, and other infrastructure features. By using the Internet, one can take the network for granted. One can assume Web server and browser software at both ends of the connection. In other words, one can take the infrastructure and user interface for granted and concentrate on the particular value-added features that are within one's own particular competence.

United States law schools have an important role to play in connection with these revolutionary phenomena. They can and should support electronic publishing and virtual library initiatives by public institutions. They must continue to perform their functions of generating intellectual and human capital in the form of scholarship and well-educated graduates, taking into account the new substantive legal issues presented by the Internet. It is increasingly clear that the Internet provides a new set of educational tools-tools for "distance learning." More schools must begin to understand how these tools can be used to improve the quality of their teaching.

### I. SUPPORTING ELECTRONIC PUBLISHING AND THE VIRTUAL LIBRARY

The Internet is a means of making existing, and mostly state-based, public institutions more effective.<sup>9</sup> The Internet functions as a virtual library, a medium for electronic publishing, and a case manager.<sup>10</sup> The virtual library and electronic

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9. "Effective" signifies improvements in democratization and legitimacy as well as improvements in efficiency. Often, efficiency conflicts with democratization and legitimacy. In the short run, transparency usually impairs efficiency.

10. Electronic publishing has multiple effects: in the first as a technique for improving the functioning of courts and other existing institutions; in the second as an example of the transformation of information markets; and in the third as an influence giving rise to new political

publishing functions are interdependent. The extent of the virtual library depends upon the scope of relevant electronic publishing. John Dawson explained how the wide availability of legal texts promoted the unification of legal systems in his classic, *The Oracles of the Law*.<sup>11</sup> The Internet, by making it easier for lawyers in different legal cultures to access information about other cultures similarly promotes unification. Constitutionalism and human rights are ripe for this kind of unification. The restricted set of authoritative texts, about a dozen new constitutions and the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights and the European Convention on Human Rights ("ECHR"), and relatively limited output of specialized courts should enhance the feasibility of constructing a complete electronic information system that encompasses all relevant precedent. There is the possibility that these institutions will develop a common case law, not necessarily in the *stare decisis* sense that a case from the Czech Republic will bind a Slovenian court, but in the sense that all of the state decisions within the United States make up a common case law. Such harmonization would make constitutionalism and human rights law a truly international set of norms rather than a patchwork differing from state to state. National courts and legislatures must be tied to supranational ones; an ECHR decision or an Organization for Security and Cooperation in Europe ("OSCE") finding cannot influence a national judge or legislator if he does not know about it. That is where the Internet enters; it enables him to find such a decision and use it as justification for his own.

A new international court, or a national one trying to enhance principled decisionmaking need not have these aspirations frustrated by a poor traditional law library. The virtual library function also enhances the legitimacy of the institutions using it. A controversial case by the constitutional court in the Czech Republic may be more difficult to vilify if it is factually similar and decided similarly as a case decided by a constitutional court in Slovenia, if the analogous case is known and recognized by the Czech judges.

A rich variety of national materials from the same country, national materials from other countries and international materials from the ECHR are available through the Web. Access to them can be organized easily and cheaply by constructing specialized Web pages oriented toward the types of cases in the areas of law most frequently of interest to a particular tribunal. The Venice Commission recognizes the potential of such an information infrastructure for the

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intermediaries.

11. JOHN P. DAWSON, THE ORACLES OF THE LAW (1968). Dawson explains the importance of dissemination of legal texts and decisions through law reports:

One main theme that will recur throughout this study is that the reasoned opinion, issued by the judge as a function of his office, is modern product. I will also contend that the assumption by judges of a duty to publish their own official statements of reasons has transformed their relationship to other agencies for the declaring and making of law.

constitutional courts by publishing their opinions and developing a conceptual topology or thesaurus to index opinions according to their subject matter.<sup>12</sup>

Electronic publishing is a tool to promote compliance as well as increasing efficiency and legitimacy. The Bosnian Ombudsman, a creature of the Dayton Accords, is a feature of human rights law. Someone alleging a human rights violation may file a complaint with an ombudsman, triggering the ombudsman's duty to investigate. If settlement is achieved, the ombudsman's job is complete. If it is not achieved, the ombudsman may publicize the human rights violation, seeking to mobilize domestic and world opinion to induce the offending governmental entity to resolve the dispute and to mend its ways.

Inherent in the ombudsman tradition and nomenclature is the idea that informal means, particularly public opinion, can be an effective alternative to more traditional, formal court judgments and coercive enforcement and execution of them. That is where the Internet comes in. The Internet is a startlingly effective new tool for mobilizing public opinion through electronic publishing.

Not only does electronic publishing on the Internet enhance the power of official judicial institutions, the vast network of interested nongovernmental organizations and human rights advocates around the world can focus public attention by adding their own indexes and analytical frameworks to raw material developed and published by the ombudsman. The need for translations into other languages need not delay publishing. The basic findings can be posted in the native language of the ombudsman with anyone else anywhere in the world performing the translation function through the World Wide Web.

Electronic publishing is profoundly important in preserving a rule of law and enhancing democracy. Freedom of information is an essential feature of responsive government. In the past, freedom of information meant a right in the press and public to obtain information on paper upon request. Now, freedom of information means more. It means the possibility of accessing virtually the entire stock of public information generated by governments at the click of a mouse button.<sup>13</sup> This is significant not only for the convenience of citizens and their representatives who can retrieve information quickly and cheaply but also for governments who can disseminate information cheaply. Now, even small countries like Macedonia can expect their information resources to be widely available even though the market for government information from such small countries is likely to be too thin for traditional publishing initiatives. Because the Internet reduces costs, it lowers barriers to entry and makes it easier for even smaller bodies of information to be made available.

The case management function permits documents filed anywhere to be available from everywhere the court desires. New constitutional courts need not establish regional court houses or be integrated with a hierarchy of trial courts in order to be accessible to individual claimants. The case management function

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12. The European Commission for Democracy Through Law ("the Venice Commission") is an advisory body on constitutional law, organized within the Council of Europe.

13. See generally Henry H. Perritt, Jr., *Sources of Rights to Access Public Information*, 4 WM. & MARY BILL RTS. J. 179 (1995).

also permits confidential deliberations among the judges and conferences with counsel without all of them having to be in the same place at the same time.

Using the Internet in this fashion, to automate adjudication, and to link it to an increasingly unified body of substantive law, does not require any change in the formal organic or procedural documents for the potential institutional users in Eastern and Central Europe. Nevertheless, the mere existence of technology does not change international law; people have to use the technology for certain activities.

The Internet is a vast virtual library. In order for this library to have a collection, however, individuals and institutions possessing relevant information must place it on computers connected to the Internet. Moreover, other individuals and institutions must provide a value-added layer of bibliographic information pointing to primary documentation. For example, the full text of treaties must be placed on the Internet, and someone must also organize a list of treaties with pointers to the text of the treaties, which may be located on a multiplicity of servers. Many of those providing the bibliographic information may choose to standardize the typologies or thesauri for indexing documents, but they need not do so. One of the Internet's major advantages is the diversity of approaches to information retrieval.

The rest of the world is just starting to take advantage of the Internet's potential for electronic publishing and virtual libraries. The United States is far ahead both in terms of its electronic publishing and virtual library activities, and in terms of its freedom of information policies. That does not mean, however, that there is not much work yet to be done in the United States. For one thing, much state and municipal information is hard to find in paper formats. The markets for such information are not large enough to induce private publishers to distribute such materials. Few local governments have the technical expertise or the motivation to organize several Web sites. Accordingly, law schools, especially those with a local or regional orientation, can perform a valuable service by working with state and local authorities and local bars to get primary material such as municipal ordinances and housing and zoning codes on the Web.

Law schools can do more. To start, every law school should make sure that its law review is available in full text form on the Web. The main purposes of law reviews are to provide a special educational opportunity for law students and to disseminate new contributions to legal scholarship. They are not primarily commercial enterprises. Thus, if placing the full text of law review articles on the Web facilitates dissemination and provides practical opportunities for law review students to learn about Web-based publishing, the Web initiative will fulfill law review purposes—it is irrelevant if Web publishing decreases "sales" of the paper volumes of the law review.<sup>14</sup>

Law schools and law professors also play an important role when they organize "portals" and "one-stop shopping centers" for legal content placed on the Web by somebody else. Faculties and deans should encourage this kind of

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14. See Bernard J. Hibbets, *Last Writes?: Re-assessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615 (1996) (suggesting web-based formats for law reviews).

publishing and enhancement activity by their faculty colleagues.

Both the placement of primary information and the publication of bibliographic aids is facilitated by the Internet. An Internet server can be established for a little as \$3000. All it takes to publish a document on the server is to save it in a particular format (hypertext markup language "html") from either of the two most popular word processing programs, Microsoft Word or Corel's WordPerfect, and then to "publish it" to a particular directory on the server—a single step in either of the two most popular Internet Web browser programs, Microsoft's Internet Explorer or Netscape's Communicator. For an institution such as a court that regularly generates textual judgments or opinions, the process of web publishing can be automated with a few simple scripts that take word processing files and automatically formats and publishes them to an appropriate Web server directory, which automatically generates indexes and tables of contents as new opinions or judgments are added.

The preparation of bibliographic aids also is simple. All one needs is a concept for organizing the information. For simple content, one simply keys the text for the usually hierarchical arrangements for organizing the information resources and links the entries on the word processing documents to the URLs for the full documents. Typically, the linking can be done with one mouse click in popular word processing programs and Web browsers. The typology or thesaurus then is published to a Web server in the same fashion used for primary documents. The Web server containing the bibliographic information may be anywhere in the world and need not have any pre-established relationship with the Web server containing primary documents.

Unfortunately, not all governments make their information resources available for electronic access. The reluctance of some foreign governments stems from the Communist era in which public access to information about government activities either was unnecessary or was actively opposed. In other instances the motivation is not to discourage public participation in government, but to make money. Many government institutions recognize the economic value of government information in electronic form and also recognize that monopolists can extract more revenue by maintaining their monopolies and discouraging competition. Accordingly, they set up government-run or government-sponsored monopolies to sell access to their information resources and block access by others.<sup>15</sup>

State sponsored monopolies involving government information are undesirable for a number of reasons. Monopolies make it easier for censorship to occur. Because monopolists have no economic incentive to introduce new technologies, monopolies usually perpetuate older information technologies, thus depriving consumers of the benefits of new technology. Monopolies rarely serve the needs of particular consuming communities as well as a competitive market

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15. See Perritt, *supra* note 13, at 184 (explaining and criticizing agency temptations to set up state monopolies over government information); Henry H. Perritt, Jr., *Should Local Governments Sell Local Spatial Databases Through State Monopolies?*, 35 JURIMETRICS J. 449, 454-55 (1995).

structure can serve them because no monopolist can understand and cater to the needs of specialized communities as well as a designer and producer who narrowly specializes.

Accordingly, information policy should commit to and encourage a diversity of sources and channels for government information.<sup>16</sup> This policy is best implemented by a legal framework that grants anyone a right of access to basic government information and also gives everyone a privilege to publish that information in electronic form or otherwise.<sup>17</sup>

There will always be commercial and economic forces aimed at creating information monopolies. Law schools, their universities and their faculties must vigilantly oppose such monopolies at the state or local level. When appropriate, they should support litigation by Web-based publishers against those who seek to enforce monopolies.

Effective use of information technology also needs technical support. The Internet is easy to use, but work is required to make it so. Any legal publishing or virtual library initiative must allocate sufficient resources to network administration, technical support personnel and training. Often, a university-based effort benefits from the availability of relatively low cost student resources in meeting these needs.

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16. A good example of a commitment to a policy of diversity is expressed in the Paperwork Reduction Act Amendments of 1996, Pub. L. 104-13, 109 Stat 163 (May 22, 1995), which amended 44 U.S.C. § 3506 to read as follows, in material part:

- (d) With respect to information dissemination, each agency shall—
  - (1) ensure that the public has timely and equitable access to the agency's public information, including ensuring such access through—
    - (A) encouraging a diversity of public and private sources for information based on government public information;
    - (B) in cases in which the agency provides public information maintained in electronic format, providing timely and equitable access to the underlying data (in whole or in part); and
    - (C) agency dissemination of public information in an efficient, effective, and economical manner . . .”

44 U.S.C. § 3506(d)(1) (Supp. III 1997).

17. See Henry H. Perritt, Jr. & Christopher J. Lhulier, *Information Access Rights Based on International Human Rights Law*, 45 BUFF. L. REV. 899 (1997). In the United States, the Paperwork Reduction Act amendments to 44 U.S.C. § 3506(d) appropriately continue:

- (4) [With respect to information dissemination, each agency shall] not, except where specifically authorized by statute—
  - (A) establish an exclusive, restricted, or other distribution arrangement that interferes with timely and equitable availability of public information to the public;
  - (B) restrict or regulate the use, resale, or redissemination of public information by the public;
  - (C) charge fees or royalties for resale or redissemination of public information; or
  - (D) establish user fees for public information that exceed the cost of dissemination.”

44 U.S.C. § 3506 (d)(4).

A number of American law schools, beginning with Chicago-Kent, Cornell and Villanova, have been pioneers in showing how the Internet can be used to facilitate dissemination of primary legal information. Cornell established a seamless channel for making Supreme Court opinions available on the Internet. The Center for Information Law and Policy ("CILP"), which the author originated at Villanova and now directs from Chicago-Kent, established the "Federal Web Locator"—a one-stop shopping center for access to every federal agency Web server. The CILP also led a consortium of law schools, including Emory, Pace, Texas and others, in organizing the "Federal Court Locator," a distributed database of all U.S. appellate court opinions, downloading them automatically from court-system electronic bulletin board computers to Web servers maintained by these law schools. Now, dozens of law schools maintain Web sites that facilitate access to specialized bodies of legal information available through the Web.

The author also led an effort, beginning with Project Bosnia in 1996, to encourage foreign law schools and other legal institutions to launch similar projects. One of the most notable successes is the Macedonian Legal Resource Center ("MLRC"), maintained by the Skopje law faculty in Macedonia. By going to the MLRC website,<sup>18</sup> one can get the full text of major Macedonian legal resource materials. The MLRC is a good example of how a law faculty can help the profession embrace the possibilities of the new technologies.

These schools and others can continue their leadership by: committing to free availability of basic legal information through the Web; allowing multiple publishing channels; and supporting university- and bar association-based efforts to educate judges and practicing lawyers on the new possibilities for legal institutions and new legal issues likely to arise from electronic commerce.

## II. DEVELOPING INTELLECTUAL AND HUMAN CAPITAL

Supporting the electronic printing press and virtual library are not enough; as legal issues arise from the Internet's use for commerce and conversation, we must also provide ideas for policy makers and educate lawyers, in the bench and the bar. Law faculties specialize in educating legal professionals and, in most parts of the world, law faculties recognize the need to include in their educational programs some exposure to issues at the frontier of legal thinking and analysis. The Internet is a source of such issues.

### *A. Developing Intellectual Capital*

Increasingly intellectual capital is beginning to be generated for these problems. The most ambitious project is the Internet Jurisdiction Project ("IJP") of the American Bar Association. Begun by the ABA Business Law Section, it now is co-sponsored with the International Law, Science and Technology and Public Utilities sections. Based at Chicago-Kent College of Law, at the Illinois

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18. Robertino Poposki & Gjorge Ivanov, *The Macedonian Legal Resource Center* (visited July 14, 1999) <[www.pf.ukim.edu.mk](http://www.pf.ukim.edu.mk)>.

Institute of Technology, and led by reporter Margaret Stewart, a professor at Chicago-Kent, the project will report at the year 2000 Annual Meeting of the ABA in London. The IJP will analyze jurisdictional issues and eight different areas of law, including privacy, tax, consumer protection, banking and financial services, contracts for the sale of goods, contracts for services, and intellectual property.

Many different sections of the ABA regularly hold programs on the legal applications of the Internet. Additionally, the National Academy of Sciences/National Research Council commissioned a major policy analysis of encryption policy, which was completed in 1996. It now has underway, in cooperation with the German American Academic Committee, an investigation of "global networks and local values."<sup>19</sup>

Law review articles are proliferating, exploring issues as diverse as jurisdiction in cyberspace, electronic signatures, appropriate application of contract avoidance rules when consumers are taken advantage of, and the like.<sup>20</sup>

As often happens with early scholarly exploration of new phenomena, many of the articles simply identify the issues raised as commerce and political activity moves to the Internet. Increasingly, however, commentators are beginning to suggest specific ways of adapting or replacing traditional legal doctrines to handle these Internet disputes more appropriately. Jack Goldsmith's proposal, that personality-based jurisdiction may be the best answer to jurisdiction problems, is one good example.<sup>21</sup> Peter Swire's distinction between "elephants" and "mice" is another because it focuses attention on the sharply different problems associated with large enterprises doing business on the Internet, where the challenge may be to prevent overreaching by national law, and small enterprises and individuals engaging in harmful activity on the Internet, where the problem more likely is to be underconclusive and ineffective enforcement.<sup>22</sup>

Larry Lessig, David Johnson, and David Post explore possibilities that new

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19. The author serves as a member of the committee.

20. A January 30, 1999 Westlaw search of the "JLR" database revealed 772 documents with the word "Internet" included in their title. See, e.g., James Garrity & Eoghan Casey, *Internet Misuse in the Workplace: A Lawyer's Primer*, 72 FLA. B.J. 22 (Nov. 1998); Michael R. Gottfried & Anthony J. Fitzpatrick, *The Internet Domain Name Landscape in the Wake of the Government's "White Paper,"* 42 B. B.J. 8 (Dec. 1998); Robert L. Ullmann & David L. Ferrera, *Crime on the Internet*, 42 B. B.J. 4 (Dec. 1998); Dawn A. Edick, Note, *Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis*, 21 B.C. INT'L & COMP. L. REV. 437 (1998); Christopher E. Friel, Note, *Downloading a Defendant: Is Categorizing Internet Contacts a Departure from the Minimum Contacts Test?*, 4 ROGER WILLIAMS U. L. REV. 293 (1998); Josh A. Goldfoot, Note, *Antitrust Implications of Internet Administration*, 84 VA. L. REV. 909 (1998); Sandi Owen, Note, *State Sales & Use Tax on Internet Transactions*, 51 FED. COMM. L.J. 245 (1998).

21. See Jack L. Goldsmith, *Against Cyberspace*, 65 U. CHI. L. REV. 1199 (1998).

22. See Peter P. Swire, *Of Elephants, Mice, and Privacy: International Choice of Law and the Internet*, 32 INT'L LAW. 991, 1019 (1998) (defining elephants as large enterprises such as AOL and mice as small enterprises and individuals).

forms of interaction popularized by the Internet might be good guides for the legal system more generally.<sup>23</sup> And the author has explored how the Internet may change international law, and the possibilities for self-governance.<sup>24</sup>

Sufficient momentum is underway with respect to research and scholarship, and other mechanisms for generating intellectual capital that little need be done to stimulate this activity. It is inevitable that law school faculties will continue to explore legal applications of the Internet and related information technologies.

### B. Developing Human Capital

Law schools also must adapt legal education to encompass the Internet. In doing so, they must distinguish between technology as an educational tool, and technology as a source of legal problems that lawyers help solve. Educating legal professionals about information technology as a tool sharpens needed skills. All law students should know how to use a personal computer ("PC") for word processing and email, and all should know how to use the Web. Increasingly, law students learn this on their own, often before they enter law school. Part of a law faculty's responsibility is to reinforce the need for these skills, to expect the skills of their students and to provide supplementary instruction as necessary for students who lack the requisite skills. The same approach is appropriate for newer skills such as ability to publish a Web page, and basic knowledge of database design and use. A competent law graduate for the 21<sup>st</sup> Century should know how to publish a Web page as easily as sending an email message.

Educating legal professionals about the legal problems arising from the Internet ultimately will occur in the regular curriculum, just as learning about contract problems resulting from use of the telephone and learning about torts arising from automobile use are covered in the regular contracts and torts classes respectively. At present, however, there are few teaching materials that cover Internet-related problems, and few faculty are sufficiently familiar with how the Internet is used in commerce and how it functions to generate their own.

Two initiatives by law schools and legal publishers thus are needed in the near term. First, they should undertake to develop teaching materials and equip willing faculty with knowledge of Internet commerce. Second, they should offer courses such as "Computer Law," "Internet Law" or "Cyberlaw." Such courses

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23. See David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370 (1996); Lawrence Lessig, *The Constitution of Code: Limitations on Choice-Based Critiques of Cyberspace Regulation*, 5 COMMLAW CONSPECTUS 181 (1997).

24. See Perritt, *supra* note 8, at 417 (suggesting points of tangency between cyberspace and other legal systems and rules of thumb for sovereign deference to cyberspace "sovereignty;" "self-governance may be more efficient; the rules and/or the adjudicatory techniques for applying the rules may need to be different from those of the surrounding community; it may be impracticable to apply the rules of the surrounding community; or compliance with basic norms of the community may be higher when members of the subcommunity participate in self-governance); Perritt, *supra* note 2, at 425; Henry H. Perritt, Jr., *The Internet Is Changing International Law*, 73 CHI-KENT L. REV. 997 (1998).

should cover the following subjects:

- (1) Introduction to Internet technology, stressing the function of routers in packet-switched networks, and the architecture of http, ftp, and mail protocols;
- (2) Contract formation via electronic networks;
- (3) Authentication and electronic payment systems;
- (4) Tort issues in the Internet, including standards for intermediary liability;
- (5) Jurisdiction to prescribe, to adjudicate, and to enforce;
- (6) Intellectual property in the Internet, especially copyright and trademark;
- (7) Computer crimes, with an emphasis on definition, detection and apprehension;
- (8) Consumer fraud and breach of Internet access service contracts; and
- (9) Relationship of the Internet to the public switched telephone system and its regulation.

These subjects can be covered adequately in a one-semester course, meeting three hours per week, if students already have sufficient grounding in basic contract, tort, jurisdiction, crimes and administrative law, and if the instructor is appropriately selective in assigning materials to permit in-depth analysis of examples rather than a superficial description of a multiplicity of problems in each topic.

For law schools it is difficult to decide how to approach Internet-related issues that eventually should be covered in regular law school courses. Unlike the case with primary and secondary public school education, it is not the legal academy's tradition to make collective judgments about the content of the curriculum. The challenge is to induce individual teachers, without interfering with their academic freedom to design their own courses, to teach their students about the legal issues which arise when commerce and other human activity moves to the Internet.

One way to accomplish this goal is to ensure that Internet problems and cases creep into the case books. Most law professors structure their courses around case books. As interesting issues in contracts, torts, procedure and property are solved by appellate courts,<sup>25</sup> casebook authors no doubt will begin to include these cases, and the problem gradually will take care of itself.

But the process can be accelerated. More and more law professors are becoming exposed to Internet issues through the American Association of Law Schools ("A.A.L.S."). For example, the A.A.L.S. program in January, 1999, included many sessions dealing with some aspect of the Internet. Notably, the sessions were not sponsored by the section on Law and Computers; they were sponsored by the mainstream sections on contracts, conflicts of law, property and civil procedure. Programming of this sort, which is likely to continue and

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25. A January 30, 1999 search of the Westlaw "allcases" database revealed 168 cases with the word "Internet" in their syllabus or headnotes.

intensify, will convince law professors all around the country, in the full range of law schools, that Internet issues define the frontier of their subject areas.

Motivated professors will expose their students to these issues on the frontier if they can do so at tolerable costs. Two ways exist to reduce costs for these law professors. One way is to make it easier for them to learn about the basic technological features of the Internet that matter in resolving legal disputes. Another way is to make anthologies of legal commentary, caselaw and statutory law available to them for a transitional period until the regular case books include such materials.

### III. USING NEW TOOLS FOR TEACHING

The Internet can be a tool for legal education as well as the subject of scholarship and education. New Internet- and Web-based technological tools, grouped generally under the rubric of "distance learning," offer new opportunities to enhance legal education.

Distance learning, as the term is used in this article, extends to all uses of computers, telecommunications, and digital networking technologies that permit education to occur outside a conventional classroom. Thus defined, it includes preparation of video tapes of lectures, pre-programmed Computer Assisted Legal Instruction ("CALI") exercises, and use of the Web to deliver these and other materials. These technologies have been around for several decades. The more interesting distance learning opportunities focus on newer technologies and new combinations of older technologies. In particular, digitized video and audio presentations can be delivered through the Web, and through appropriately designed Web pages, video and audio can be combined with interactive exercises, assigned and supplementary text and graphical materials, and electronic discussion groups.

In the past five years the interest in and capability to deliver computer-supported education at a distance has literally boomed. Federal funding, the emergence of the Internet, pervasively available and inexpensive PCs, and the potential for efficiency, reach and pedagogical improvement, have fueled growing interest and experimentation by universities in the use of distance education. Experimentation with distance learning technologies has occurred at Cornell, Chicago-Kent, Villanova, SMU, and elsewhere. Typically, these experiments involved specialized proprietary videoconferencing technology in relatively small classes. The Kaplan Organization announced its intent to offer a J.D. degree entirely through the Internet. Regents University received approval from the ABA to offer an L.L.M. degree entirely through the Internet. Florida State University and the Open University and College of Law of England and Wales have announced their intention to explore offering a variety of undergraduate legal courses remotely, making greater use of Internet technology.

Meanwhile, engineering schools, including such distinguished ones as Stanford, and MBA programs, including such distinguished programs as to the Sloan School of Management at MIT and the Wharton School of Business at the University of Pennsylvania, are actively deploying distance learning alternatives to their regular programs, especially in foreign markets.

Because distance learning can both supplement, and replace parts of an existing education process, it is convenient to have in mind a simple model of the conventional process. Such a model can unbundle a J.D. course into four components: (1) classroom instruction; (2) class preparation through assigned readings; (3) occasional office visits in which students and instructor discuss course materials and deal with student questions; and (4) student-to-student discussion of materials, such as occurs in study groups.

Use of distance learning technologies is most advanced for the second component. Through one of several available techniques for electronic publishing, authors and editors of course materials can make them available cheaply and conveniently to law students who can read assignments on the screen or print them. The electronic case books used in Chicago-Kent's first-year E-Learn section focus directly on this component of legal instruction. Other techniques, such as publishing all or some of course materials on a Website and linking those materials to entries on a syllabus, are similar examples of automating this component. A significant percentage of published law school case books are available in electronic form, albeit not directly on the Web.

A growing number of law schools are using Internet technologies, predominately e-mail and e-mail listservs, to automate the third component. Students send their questions about points covered in class or read in assigned materials to the instructor who either replies by e-mail or broadcasts the question and answer to the entire class. Web-based discussion groups are another way of organizing the same kind of interaction between student and instructor. Most users of the technology find it more efficient than office hours and student appointments. However, the character of the student-instructor interaction is qualitatively different through the newer medium. It is more focused, partially because an average typist finds extended exploration of related points burdensome and inconvenient. The use of distance learning for this component of instruction tends to make student-instructor interactions more succinct, which may or may not benefit learning.

The same technology applications often used for the third component are well suited for the fourth, student study groups. For several reasons, this technology has been used sparingly in the past. First, students tend to use the discussion groups and listservs to present questions directly to the instructor, and they are likely to use the application for nothing else unless the instructor deflects these bilateral questions and answers into a broader multilateral electronic discussion. Not many instructors realize the need for this purposeful intervention.

Moreover, the same characteristics of the technology that discourage extensive exploration of collateral points and intellectual context in student-instructor discussions may also discourage wide ranging electronic study group discussions among students. It takes more work to follow a group discussion through a computer display than simply to sit at a conference table and participate orally.

Less has been done to use information technology to complement or replace what goes on in the classroom, the first component. To be sure, the Illinois Institute of Technology and other universities have been using distance learning

in the form of remote television broadcasts of classroom lectures for many years. Closed circuit video of this form, however, simply takes a piece of what goes on in the classroom and makes it available remotely; it does not probe the classroom experience deeply or select particular pieces for technological enhancement. The E-Learn experiment at Chicago-Kent has motivated automation of the classroom experience. Not only has student use of electronic case books on notebook computers in class subtly altered the in-class interaction between student and teacher, in class use of Web pages and prepared electronic materials has presented alternatives to the spoken word, blackboard diagrams and paper handouts.

Limited distance learning experiments with Internet-based television, have permitted student-student and student-instructor interaction in "classroom" environments encompassing multiple law schools at the same time. Chicago-Kent faculty and technology staff who have participated in these experiments have come away struck by how much is missing from a simple broadcast of a part of a law class. Much of the ritual, stress and entertainment aspects of a good Socratic law class is lost. The subtle nonverbal cues from class to instructor communicating levels of preparation, degree of student comprehension, boredom and interest are lost. To the extent that the best law school classes have these elements in them, and to the extent that good law professors make effect use of pace, momentum, theatre and overall group dynamics in their teaching, it is important that further technology development in legal education explore these phenomena more deeply and take advantage of the full range of technological tools that are readily available. Only in such an environment can choices of techniques be driven by pedagogical judgment rather than technological convenience.

In addition, several decades of bar review teaching, in which video broadcasts are a regular alternative to live classroom presentation, provide a rich source of empirical data about the impact of video technology on the educational process. Little has been done so far to make effective use of this experience.

The frontier for distance learning is the classroom. Use of Web technologies for other components of the learning experience are proven and will be used by more law faculty as they become familiar with the techniques and gain access to the necessary infrastructure. As the interim ABA guidelines note, distance learning can be useful not only for regular law school classes in J.D. programs, but also for post-J.D. programs, for clinical instruction where maintaining faculty oversight can be difficult, and for foreign programs. Chicago-Kent has been especially active in exploring distance learning techniques for managing international Rule of Law externship programs, and in designing new practitioner-oriented education programs for China.

#### *A. Virtual Classroom*

The preceding section suggested that one can think about distance learning technologies in legal education in two different contexts. The first context relates to using distance education technologies as an enhancement to regular classroom-based instruction. The second context invites consideration of the use

of distance learning technologies as a way to substitute new modes of education for some existing classroom time. This section considers the second context and poses some of the questions that must be resolved in designing useful experiments for "virtual classrooms."

Good design of a virtual legal classroom begins by deconstructing the law school classroom experience. One approach to such deconstruction identifies the following specific purposes for classroom instruction in law school, with the first-year socratic class as a paradigm, including:

- (1) Modeling the behavior of judges and advocates;
- (2) Transmitting information;
- (3) Quizzing students to give them feedback on how they do;
- (4) Allowing students to practice articulating legal concepts and developing argument and patience skills; and teaching students how to deal with stress in an advocacy situation.

If one accepts the above-mentioned list, it is apparent that many of these purposes can be met by the use of information technology equally as class instruction. The quizzing and the translating information tasks are the clearest examples. Other goals, such as role-modeling, might be best met by showing law students actual instances of judging and advocacy.

Using information technology to relax the constraints of the calendar and the clock could improve what now must occur in the classroom. For example, one could begin a semester with actual virtual observation of judging and in court advocacy. Then, one could have a period of live discussion followed by a period of virtual interaction shaped by specific professor questions and CALI-type exercises. Toward the end of the semester, one might have a moot court or mock trial experience for all the students followed by a critique. By substituting information technology for the classroom channel in instances where information technology can do the job as well or better than in-class activity by the professor, the professor is freed to do other things that ordinarily would not be feasible within manageable investments of time for regular classes.

However, designing appropriate "virtual classroom" tools and modules requires answering a number of mixed pedagogical and technological questions.

*1. How Much Content Should Be Produced in a Studio Environment and How Much Should Be Captured from an Actual Classroom?*—Capturing classroom activity by video and audio broadcast reduces the requirements for faculty time, and, therefore, may be more acceptable to some faculty members, and may require fewer budgetary resources. On the other hand, costs for video and audio operators may be higher because of the need for cameras to follow instructor movement around the classroom and to capture student interaction. Also, because of the complexity and richness of a good classroom interaction, it almost certainly requires a high degree of artistic talent to capture the important qualities of the interaction. It is not clear whether law schools will be able to mobilize the requisite cinematographer, director and video editing talent at affordable costs. If they cannot do so, simply filming students and professors in a Socratic classroom is likely to be the merest shadow of the reality.

Studio production permits use of technology to do things that are difficult to

do in a live classroom, such as quizzes and programmed instruction, scripted presentations, simulations and multimedia techniques such as streaming PowerPoint presentations. It also may be easier to make effective use of video or audio of actual real world events when they are edited into other studio-produced materials, rather than being played live in a classroom with the entire classroom experience including audio visual aids being taped or broadcast. The principal disadvantage of extensive studio production is greater expenditure of faculty time, probably much greater, and the capital expenditures necessary for appropriate production and editing equipment.

2. *How Important Is a Group Setting for the Students?*—Regardless of the nature of the distance learning materials, whether broadcast or recorded from a classroom or produced in a studio, they can be delivered to students either in a solo setting, such as an individual student's home or office, or they may be delivered to students in a group setting, such as a remote classroom, or a conference room controlled by an institutional sponsor. The common experience of most people suggests that there is significant motivational value of being scheduled to go to class at a particular time with other people. There is a combination of embarrassment and loss of self esteem when one misses class. The loss of self esteem is less when one simply fails to do an individual computer-based exercise. Also, distractions are minimized in the classroom; students are shielded from telephone calls, television in the background and requests from children or spouses.

On the other hand, some of the benefits of distance learning technology are eliminated when one delivers education only into group settings. Actual or imputed rent must be paid for the classroom space. Students must travel to be with other group members. The group must meet at prescribed times. There must be enough students within a reasonable distance to permit a group to be formed. Eliminating the group learning constraint permits time shifting entirely according to individual student desires that eliminates the cost and time associated with travel and any sort of critical-mass or remote-facility requirement.

Technology requirements for group learning are challenging. It is difficult with low-cost, Internet-based technology to capture the group interaction. Should there be one or multiple cameras? Should each student be wired, should a staff member carry a microphone around the classroom, or is the group small enough to use a single, table-top microphone? On the other hand, equipment for delivering course content to students in groups is simpler than delivering it to students in solo settings. Only one appropriately-sized video display device and an audio system is necessary for the entire group, as opposed to one for each student that would be necessary in a solo setting. Also, the students can interact with each other orally, eliminating the need for technology applications to permit student to student interaction. Obviously, design decisions must be made as to how the remote group communicates with the professor, but that decision also must be made with respect to solo learners.

3. *Should the Virtual Classroom Experience Be Synchronous (Simultaneous) or Asynchronous (Time Shifted)?*—Asynchrony (time shifting) has advantages, including accommodation of student and professor. Anyone can schedule class

attendance whenever it is most convenient, assuming solo, rather than group reception. Specific classes can be defined by time periods, such as twenty-four or forty-eight hours or one week. To attend that class means to participate a specified number of times during that extended period. Students can interact with each other and with the professor by posting questions or comments in the form of text messages or video or audio clips. They also can make changes to Web pages to which they all have access, a kind of white boarding concept. Through these processes, asynchronous interaction can be fairly probing.

On the other hand, the lags between question and answer and comment and response can reduce the quality of the experience. A live interchange permits instant clarification of ambiguities or misunderstandings. Simultaneous interaction, to be efficient, must involve audio and perhaps video; it is simply too inefficient for multiple users to wait while a poor typist laboriously enters an idea in a conventional "chat room."

4. *How Much Does Video Add?*—The most common form of distance learning is probably a "talking head," a broadcast or video recording of a professor teaching a class. It is reasonable to ask how much richer such a video image is than presentation of the same class through audio alone, especially when the video images such as streaming video over an Internet connection are not "television quality." A related question is what should be shown on the video. Under what circumstances is streaming PowerPoint or edited video of real world events better than a talking head? On the other hand, talking heads are almost certainly cheaper to produce than any other kind of video.

5. *What Is the Most Appropriate Mix Between Audio and Text?*—Should some things be delivered by streaming audio rather than text? Why, because audio is easier and cheaper than text? What use should be made of voice recognition technology to produce transcripts, perhaps imperfect transcripts, of prerecorded audio?

6. *To What Extent Should Media Channels Between Students and Professor Be Symmetrical?*—One can envision distance learning environments in which material is presented to students through a combination of full motion video, audio, text and static images, while students respond and interact with each other only through text. This is a typical Web-based distance learning environment. One can also envision a setting in which students receive video and audio, but respond only via audio, as in a typical remote classroom equipped with a speaker phone. How important is it to add video from the students? What is the purpose? Does it enhance the students' experience or the professor's, or both?

7. *Does the Following Adequately Disaggregate the Elements of a Traditional Class?*—Communicating rules and concepts to students? Role modeling—exemplifying problem-solving behavior of practicing professionals? Giving feedback to students through quizzes and evaluation of simulated professional activities? Allowing for student-to-student interaction?

8. *What Technology Applications Are Most Interesting?*—Multi-user white boards? Multi-user Internet Telephony? Improved video streaming over the Web? To be "interesting," an application must be available in easily deployable form and must meet a pedagogical need.

### *B. Accreditation Issues*

Aggressive use of distance learning raises significant problems under the existing rules of accreditation for law schools to the United States. Standard 304(f) of the ABA standards for approving law schools says, "a law school will not grant credit for study by correspondence." Almost everyone interprets this prohibition as including any form of distance learning that might be useful. In 1997, however, the Section on Legal Education of the ABA adopted interim guidelines to encourage experimentation with distance learning.<sup>26</sup> These guidelines suggest a more favorable reaction to post-J.D. programming than to J.D. programming and also express a clear preference for educational content sent from one physical law school to another rather than programs that allow students of one law school to receive credit at that law school without physically being present for classes.<sup>27</sup>

Beyond that, the interim guidelines allow considerable room for experimentation with technology that enhances existing courses as long as students are not relieved of the obligation for regular and active physical participation in classes.

It is important to understand the relationship between Learning with Electronics at a Distance Program ("Learn-ED") experiment and accreditation. Accreditation is a standardization and minimum quality control system. It is not meant to be the source of innovation. It may be that new technologies make available teaching techniques that should cause accreditation rules to be changed. The legal academy will never know what those are if experiments only take place within a conservative estimate of what the accreditation rules allow. Accordingly, an essential part of any proposal is that it be bold and essentially uninhibited by existed accreditation standards. Law schools must be willing testing grounds. This does not suggest defiance of accreditation rules or bodies; instead, it suggests taking a prominent leadership position in the current A.A.L.S. and ABA task forces which are developing an understanding of the relationship between distance learning technology and sound education.

### *C. Specific Plans*

For almost two decades the Chicago-Kent College of Law has been preeminent in the application of computer technology to the teaching of law. The law school has gathered a gifted faculty of powerful intellectuals who are making visible and important contributions to legal scholarship. Its parent institution, the Illinois Institute of Technology, has been a leader in the use of analog television for distance education.

Chicago-Kent intends to leverage its historical institutional strengths and the recent societal developments to move in a deliberate but concerted way towards

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26. See *Temporary Distance Education Guidelines*, SYLLABUS (ABA Sec. of Legal Educ. and Admissions to the Bar), Fall 1997, at 12 (encouraging experimentation).

27. See *id.* at 13 ("[D]elivery of course work to a person's home or office would generally not be in compliance with these principles.").

leadership in the delivery of computer-enhanced legal education at a distance. The law school will devote focused energy to enhance all of its E-learn sections to enable professors and students to use Internet tools as improvements to the existing traditional classroom instruction. E-learn techniques will be applied to the second and third year curriculum when targets of opportunity appear, as the faculty approves extensions of the present initiative.

Chicago-Kent will begin to deliver an Internet-enhanced Evening Division curriculum in fall 1999. The law school will immediately review the pedagogy, methodology, support structure, performance and student acceptance of its pioneering E-learn first year curriculum. All faculty members teaching E-learn sections will be offered additional resources to extend, improve and enhance the use of computer-assisted techniques. Special emphasis will be placed on the use of Internet tools that permit students to learn collaboratively and asynchronously. In early 1999, faculty members were recruited to devote intense effort to make the Evening Division curriculum a model for electronically enhanced education. The school began immediately to enhance electronically all of the courses taught in the Evening Division. Special emphasis was placed on delivering educational experiences outside the classroom using distance education, including faculty-student interaction outside of class, student study groups and discussions, clinical simulations and client interaction over the Internet. Classroom instruction and the study of substantive material were supported by use of computer exercises, problems and interactive lessons. This Learning with Electronics at a Distance Program ("Learn-ED") will evaluate and experiment with distance learning technology, including e-mail, discussion groups, chat rooms, streaming video and audio, video conferencing and computer white board tools.

Upper level courses will be enhanced in the same way, as faculty choose to implement these changes. Enhancing the Day Division first year courses will produce two years of curriculum for the Evening Division. In 2000 the school will reevaluate the progress in large enrollment upper level courses to determine if more directed efforts to encourage distance enhancements are needed.

In addition to the strategic target of a distance-enhanced Evening Division beginning in fall 1999, the law school expects that the educational tools, lessons, simulations and exercises will be useful in building a variety of instructional programs for other markets. These new markets will include foreign lawyers interested in U.S. law, undergraduates seeking interprofessional degrees, business executives and others who will not practice law but seek less-expensive or less-disruptive access to high quality legal instruction. The new educational program and materials will be mined to leverage their usefulness in these new markets. Obvious examples include: the China-Bridge initiative, Building Businesses on the Web, the Financial Markets curriculum and a number of opportunities for distance instruction in Europe.

As soon as possible, three core upper class subjects, such as Evidence, Federal Income Taxation, Constitutional Law, Decedents' Estates or Federal Courts should be scheduled so that one contact hour per week can take place in a regular law school classroom and the remaining contact hours (typically two) can occur through appropriately-designed distance learning Web channels. Initial selection of courses should give preference to subjects in which interactive

instructional materials already exist. The Web-based contact hours should be designed to provide, as nearly as possible, the educational ingredients present in the classroom and addressed by accreditation standards, specifically including instructor control, student eligibility for being "called on," instructor feedback to student recitation and exposure of student contributions to other students in the class. The Web-based contact hours should be packaged so that one class session can be distinguished from another and linked with the assigned materials. In other words, each Web-based class should be a discrete event, although it would not necessarily demand the simultaneous participation of all students and instructor. Instead, the class might be spread over a defined time period to permit the benefits of time shifting. Asynchronous participation will extend student scheduling flexibility with important benefits to evening students.

The Web-based instructional sessions should draw upon the "preceptorial" model of education pioneered for undergraduate education by Woodrow Wilson. At the end of the first year, student performance on examination questions can be compared with student performance on the same questions in regular classes covering the same subject matter. If this cannot be arranged politically, perhaps "baby bar" questions could be given to the Learn-ED students. Upper class experimentation would be done under existing accreditation ground rules. To the extent it seems appropriate, accreditation authorities would be notified of the experiment.

Eventually, as accreditation rules are modified, the same techniques, refined in light of the first year experience, could be extended to first year students with at least two first year courses taught in the same fashion. Similar assessment techniques would be used, and the accreditation authorities would more completely engaged, perhaps conducting onsite visits.

#### *D. Mobilizing Faculty Support*

Distance learning will never become successful in legal academia unless mainstream law professors lend it support. It is not enough to get the computer aficionados of the faculty to experiment with distance learning tools. One must enlist the respected Socratic teachers, who teach large classes in basic subjects, regardless of whether they like computer technology. Of course not all such people must be enlisted at the same time. But any serious strategy to experiment with distance learning and to learn more about the relationship between technology and legal pedagogy must involve, from its earliest stages, at least one large-class basic-subject Socratic instructor.

One can anticipate that the biggest source of faculty opposition to distance learning techniques will derive from the professors' sense of independence and tradition. Most of us honor Justice Holmes' maxim that we should do legal education not only in a competent matter but also in the "Grand manner." The paradigm of a successful law school class involves considerable theater. There is great ego satisfaction in teaching one of these classes. To the extent that distance learning technology pulls professors off center stage in the classroom and turns them into video producers and casting directors, the thrill of teaching law will diminish.

As with any innovation, thought must be given to incentives, favorable and unfavorable, for instructors and students who might participate. In the long run, Learn-ED classes might be more attractive than regular classes to law school faculty because of the advantages of time shifting and flexibility of location. In the short run, however, teaching a Learn-ED class will mean considerably more work for the instructor than teaching a regular class. The educational experience must be rethought, the components of a traditional course unbundled and repackaged to take advantage of the technology, and the anxiety associated with any experiment and inevitable difficulties and implementation tolerated. Because of these short run disincentives, significant economic incentives must be made available to those faculty members willing to participate. It is especially important that these incentives be available because, for the experiment to be successful, a broader range of faculty beyond those fascinated with technology must be enlisted. In particular, faculty who like to teach Socratically and using other interactive methods must participate, rather than those who are inclined to lecture and who find it easy simply to prepackage their lectures in electronic media.

# CLOSING ONE GAP BUT OPENING ANOTHER?: A RESPONSE TO DEAN PERRITT AND COMMENTS ON THE INTERNET, LAW SCHOOLS, AND LEGAL EDUCATION

MICHAEL HEISE\*

## INTRODUCTION

Dean Perritt is surely correct when he writes that "The Internet's potential for changing the face of American law schools is profound."<sup>1</sup> Some might take issue with the implicit suggestion that American law schools share a single "face."<sup>2</sup> Others might emphasize the Internet's important influences that are already manifest.<sup>3</sup> And perhaps some might press Dean Perritt for a more precise definition of what he means by "profound." But, on balance, these points rise to little more than mere quibbles that take little away from the overall thrust of Dean Perritt's general observations. Indeed, after examination, Dean Perritt's main premises remain standing: Information technology—as deployed in the Internet's World Wide Web—is changing traditional areas of the law,<sup>4</sup> fueling new law,<sup>5</sup> altering how legal institutions function, and transforming lawyers' roles within those institutions.<sup>6</sup> Dean Perritt's conclusion—that the Internet and

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1. Henry H. Perritt, Jr., *The Internet Is Changing the Face of American Law Schools*, 33 IND. L. REV. 253, 253 (1999).

2. To get some flavor of how law schools might differ, see, e.g., INSIDE THE LAW SCHOOLS: A GUIDE FOR STUDENTS BY STUDENTS (Sally F. Goldfarb ed., 6th ed. 1993).

3. See *infra* Part I.

4. See, e.g., Saba Ashraf, *Virtual Taxation: State Taxation of Internet and On-Line Sales*, 24 FLA. ST. U. L. REV. 605 (1997) (tax); Stephen P. Heymann, *Legislating Computer Crime*, 34 HARV. J. ON LEGIS. 373 (1997) (criminal law); Corey B. Ackerman, Note, *World-Wide Volkswagen, Meet the World Wide Web: An Examination of Personal Jurisdiction Applied to a New World*, 71 ST. JOHN'S L. REV. 403 (1997) (civil procedure).

5. For example, President Clinton signed into law the Communications Decency Act of 1996, which constitutes Title V of the Telecommunications Act of 1996. See Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133-36 (1996) [hereinafter CDA]. The CDA was ruled unconstitutional by the Supreme Court in *Reno v. Shea ex rel. Am. Rep.*, 117 S. Ct. 2501 (1997), aff'g 930 F. Supp. 916 (S.D.N.Y. 1996).

6. See Richard A. Matasar & Rosemary Shiels, *Electronic Law Students: Repercussions on Legal Education*, 29 VAL. U. L. REV. 909, 910 (arguing that the legal profession is pushing law schools to embrace technology to a greater degree); Catherine G. O'Grady, *Preparing Students for the Profession: Clinical Education, Collaborative Pedagogy, and the Realities of Practice for the New Lawyer*, 4 CLINICAL L. REV. 485 (1998).

Internet-related technology are changing American law schools<sup>7</sup>—strikes me as similarly persuasive. Indeed, I argue that his conclusion has already proved accurate. More specifically, to some degree the Internet has already changed American law schools.

However, even if one assumes that Dean Perritt's observations are basically correct, where they lead us remains decidedly unclear. What does it mean to say that the Internet's increased integration into legal education fuels changes in how law schools educate their students? Obviously, more specificity would assist this inquiry prompted by Dean Perritt's Article. Perhaps regardless of the precise directions that the Internet will point legal education or even how one might construe them, I respectfully suggest that the Internet's influences on legal education make three related but slightly distinct questions ripe for consideration.

One question raised by Dean Perritt's Article concerns the magnitude of the changes to legal education that will result from the Internet's increased integration into law schools. A second question dwells on how the Internet's influence on law schools will manifest itself. Perhaps even more important is that the combination of the first two questions generates a third question. Embedded within this third question lurks a potentially troubling paradox. While the increased use of the Internet as an educational tool may well help close technological gaps,<sup>8</sup> at least those suggested by the overarching theme of this conference,<sup>9</sup> whether such gaps can be closed without generating new gaps between law schools and their students and among law students remains far from certain and warrants careful consideration.

Criticism of Dean Perritt's observations is not properly inferred from this Article's focus on the three questions described above. Indeed, just the opposite inference is more appropriate. The issues that Dean Perritt ably discusses are critical and concern (or should concern) all legal educators as well as law students, particularly future law students. The implications of Dean Perritt's remarks are especially important for those who produce and consume legal education services. Moreover, his discussion of the multiple intersections of technology and legal education contributes to a welcome and much-needed base that will support and fuel further elaboration.

That neither I nor anyone else that I am aware of—not even, dare I say, Dean Perritt—really knows the answers to my questions is not a reason to avoid them. Rather, the questions' difficulty provides yet another reason to pursue answers with vigor. This is particularly so if, as Dean Perritt suggests, it is inevitable that

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7. See Perritt, *supra* note 1, at 253.

8. Dean Perritt briefly notes that leading American business schools already deploy Internet technology, especially through distance learning programs. One obvious thrust of Dean Perritt's observation is to illustrate that in relative terms American law schools lag in their implementation of Internet technology. See Perritt, *supra* note 1, at 265; see also Andrea L. Johnson, *Distance Learning and Technology in Legal Education: A 21st Century Experiment*, 7 ALB. L.J. SCI. & TECH. 213, 227 n.54 (1997).

9. *A Symposium on Law and Technology in the New Millennium: Closing the Gap*, 33 IND. L. REV. 1 (1999).

law schools will continue to explore new ways to harness the Internet.<sup>10</sup> That the questions uncover even a small sector of uncertainty should give thoughtful and concerned people pause. However, pause should not be confused with paralysis, at least in this context. The uncertainty surrounding the Internet's present and future influence on legal education is no reason to shy away from its continued deployment so long as its use is accompanied by the necessary care and judiciousness. Instead, my small point is that as the Internet becomes increasingly integrated into legal education—as it in many ways should and, like it or not, will—legal educators need to think through this powerful and potentially useful educational tool as well as its implications for our students and how we go about teaching law.

### I. THE INTERNET HAS ALREADY CHANGED LAW SCHOOLS IN WAYS BOTH BIG AND SMALL

Dean Perritt correctly notes that the Internet “is changing the law, the functioning of legal institutions[,] and the role of lawyers.”<sup>11</sup> The implications for the rule of law, citizenry, commerce, and the host of other aspects discussed in Dean Perritt’s Article are products of the Internet’s “modular character and [ ] universality.”<sup>12</sup> Indeed, now that the Internet is, essentially, ubiquitous, one can take its infrastructure—indeed, its very existence—for granted.<sup>13</sup> Those who endeavor to resist the Internet and Internet-related changes, even if resistance was feasible, will quickly learn that such efforts will largely fail. Not only is the cyberspace “genie” out of its bottle, but the bottle has been shattered—effectively precluding any chance that the Internet will disappear or that its influence might wane. As far as legal education is concerned, the Internet has arrived and it will remain germane for the foreseeable future.

From this, Dean Perritt correctly concludes that the Internet is changing American law schools. This conclusion safely follows for two main reasons. First, the Internet has already changed numerous institutions—political, legal, social, and economic institutions—which surround and influence law schools. For example, as Dean Perritt and others note, the Internet influences political and legal processes<sup>14</sup> and commerce.<sup>15</sup> Consequently, the Internet’s influence on institutions that surround and influence law schools indirectly bears on law schools themselves. This result is hardly surprising, especially to those who

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10. See Perritt, *supra* note 1, at 263.

11. *Id.* at 253.

12. *Id.* at 255.

13. See *id.*

14. See *id.* at 253 n.2.

15. See, e.g., Kerry L. Macintosh, *How to Encourage Global Electronic Commerce: The Case for Private Currencies on the Internet*, 11 HARV. J.L. & TECH. 733 (1998); Henry H. Perritt, Jr., *Legal and Technological Infrastructures for Electronic Payment Systems*, 22 RUTGERS COMPUTER & TECH. L.J. 1 (1996).

understand the nexus between law schools and the world around them.<sup>16</sup> One obvious example involves law firms, many of which have turned increasingly to Internet technology. As law firms continue to incorporate Internet technologies, one will almost certainly find increased pressure brought to bear on law schools by law firms to follow suit.<sup>17</sup>

Second, as Dean Perritt notes in the title of his Article and discusses throughout, a second set of changes implicates law schools directly. Notable is Dean Perritt's bold point about law schools' role in fueling the "revolutionary phenomena" ushered in by the Internet.<sup>18</sup> Thus, in Dean Perritt's view, law schools not only respond to the Internet's influence, but are well positioned and structured as institutions to help shape the Internet's development.

It is on the second set of changes that I take small issue with Dean Perritt. My issue relates to his choice of verb tense. I argue below that Dean Perritt is simultaneously correct, but too timid and cautious. A small adjustment to Dean Perritt's title would address my point and result in a more accurate characterization. Specifically, I argue that the Internet has already changed the face of American law schools, albeit in modest ways. Moreover, the changes that have already arrived—however small or subtle—provide important clues to even greater changes that lie ahead.

#### *A. Scholarly Resources*

While it is certainly much more, the Internet is already among the world's most powerful and rich sources of information. As such, it can serve as the world's virtual library. Just as the law library serves as an integral part of a law student's legal education, the Internet is now likewise an integral part of the law library. It is already difficult to imagine a law library without Internet access. Indeed, by as early as 1996 some argued that the migration to electronic information and technology in all aspects of legal education, particularly law libraries, was a "fait accompli."<sup>19</sup> In time, the Internet might rank among—perhaps even be—the most important component of a law library.

The implications of increased Internet accessibility as a scholarly resource for law schools, principally through law libraries, are large. As the principal

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16. See Michael A. Geist, *Where Can You Go Today?: The Computerization of Legal Education from Workbooks to the Web*, 11 HARV. J.L. & TECH. 141, 182 (1997) (arguing that "[t]he development of the Internet is likely to mark a turning point in the computerization of legal education").

17. See Matasar & Shiels, *supra* note 6, at 910.

18. See Perritt, *supra* note 1, at 255 (arguing that law schools have an important role to play in connection with the Internet's development). *But see* Geist, *supra* note 16, at 161 (downplaying law schools' contribution to the development of web materials for law students).

19. Richard A. Danner, *Facing the Millennium: Law Schools, Law Librarians, and Information Technology*, 46 J. LEGAL EDUC. 43, 43 (1996) (quoting Robert C. Berring, *The Current State of Networked Information in the United States and Why You Should Care About It*, 26 LAW LIBR. 246, 246 (1995)).

engine of new legal knowledge, law schools have a special responsibility and role to play in virtual law libraries' development. Not only do legal scholars need to generate new legal knowledge with an eye towards the Internet, but they must also think through how this new medium can be best deployed within the context of a law library's system of services. If law libraries continue down the path already embarked upon, it is difficult to overstate their potential for generating social change flowing from the increased availability of information. The Internet is our generation's vehicle to vastly increase information's reach. The Internet and its capability to construct a virtual library pose a serious threat to many information monopolies, public and private.<sup>20</sup> With greater access to information comes, as the saying goes, greater power. Greater power, more widely dispersed, reaffirms Madison's insight into the structural benefits of offsetting competing political factions.<sup>21</sup>

### *B. Scholarship*

A second example of how the Internet has already influenced legal education relates to scholarship, particularly its production and distribution. On the production side, many—if not most—legal scholars avail themselves of Internet-driven listservs, websites, and e-mail. Access to information now available on the Internet enables legal scholars to blunt challenges to research posed by geography. One consequence is the greatly increased potential for scholars to interact with one another. Scholars now collaborate more easily and effectively with colleagues whom they might otherwise not collaborate but for the Internet. Increased interaction and collaboration among scholars increases the flow of information among them. On balance and over time this should contribute to increases in scholarly productivity and quality.

The Internet has already influenced the distribution side of legal scholarship. For example, scholarly outlets, what we traditionally have come to know as law reviews or journals, no longer appear exclusively in a form that can be touched by the human hand. On April 10, 1995, the University of Richmond's T.C. Williams School of Law launched the *Richmond Journal of Law and Technology*, purportedly the world's first student-edited, scholarly legal journal published exclusively on-line.<sup>22</sup> Setting aside the perennial debate among legal academics about the merits of student-edited law reviews,<sup>23</sup> the development of an entirely

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20. One interesting example of public and private information monopoly is the functional control over documents generated by the federal government. Traditionally, Washington D.C.-based lobbying firms levered their physical location to gain economically by influencing the legislative processes. The advent of the Thomas website, however, blunts some of the comparative advantage flowing from geography. Now any individual with access to the Internet can benefit from current access to governmental documents and information. See <<http://thomas.loc.gov>>.

21. See THE FEDERALIST No. 10, at 122-28 (James Madison) (Isaac Kramnick ed., Penguin 1987).

22. See <<http://law.richmond.edu/general/student.htm>>.

23. In the world of scholarly journals, typical law reviews stand in stark contrast to blind

on-line law review raises interesting questions of its own.<sup>24</sup> On the one hand, an electronic journal possesses the distinct advantages of timeliness and mass distribution or circulation. Although it might not yet be realized, electronic journals have the potential for speedier turn-around time as their production time should be less than that of their traditional paper counterparts. In fast-moving areas of the law, this might yield strategic and comparative advantages. It also might placate some law professors who tire of waiting for law review printing companies to generate and ship their Article reprints. Also, electronic journals typically are distributed free to those who can access cyberspace. Such a potentially broad and low-cost distribution system might further disseminate legal scholarship to a wider audience. Of course, even paper law reviews can blunt this potential comparative disadvantage by placing their volumes on-line. Finally, the notion that a professor can "publish" a scholarly article in a medium that exists only in cyberspace might generate interesting questions for promotion and tenure committees.

The Internet's influence on scholarship extends far beyond its own medium. The Internet has been the subject of much scholarly focus recently and shows no sign of abating.<sup>25</sup> The subject of this symposium is yet another example that the intersection of the Internet and legal scholarship is rich, and its surface has only been scratched thus far.<sup>26</sup> Although I am not aware of any journal devoted exclusively to Internet law issues,<sup>27</sup> many journals and reviews specialize in law and technology topics that frequently include Internet and Internet-related issues.<sup>28</sup>

### C. Law School Teaching

Few law professors today can walk into a law school classroom and not find a sizable, though varying, number of students using laptop computers equipped

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peer-reviewed journals. For a discussion of related issues, see, e.g., Symposium, *Law Review Conference*, 47 STAN. L. REV. 1117 (1995) (discussing various issues relating to student-edited law reviews).

24. See generally Bernard J. Hibbitts, *Last Writes?: Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615 (1996) (arguing that the Internet reduces the usefulness of current, more traditional law reviews).

25. As one crude proxy, Dean Perritt points to the number of sessions at the most recent American Association of Law Schools annual conference devoted to some aspect of the Internet. See Perritt, *supra* note 1, at 264.

26. In a footnote, Dean Perritt notes that as of January 30, 1999, a search of the "JLR" database in Westlaw revealed 772 documents with the word "Internet" in their title. See *id.* at 262 n.20. My identical search conducted just eight months later revealed 953 such documents, reflecting a 23% increase.

27. Given the recent and sustained proliferation of law reviews and journals, such a specialization is not beyond the pale.

28. See, e.g., JURIMETRICS: J. L. SCI. & TECH.; BERKELEY TECH. L.J.; HARV. J.L. & TECH.; IDEA: J. L. & TECH.; RICHMOND J.L. & TECH.

with Internet access and web browsers. Many schools are examining the feasibility of direct Internet access availability at each student station in law school classrooms. This is particularly true at the small but growing number of law schools that require students to possess computers upon matriculation.<sup>29</sup> An already sizable number of faculty regularly interacts with those students technologically equipped and inclined on-line through e-mail and websites.<sup>30</sup> A related development involves on-line class discussion through moderated or unmoderated listservs.<sup>31</sup> Such developments parallel movement outside law schools' walls. Increasing litigation over such questions as whether employers can "snoop" or "eavesdrop" on employees' e-mail "conversations"<sup>32</sup> and whether archived or stored e-mail is discoverable material hints at the proposition that e-mail is fast becoming increasingly woven into the fabric of how people

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29. For example, the University of Oregon School of Law requires all students to possess laptop computers upon matriculation. Notably, because the University of Oregon requires its law students to have laptops, their cost is included in a law student's financial aid package. See <<http://www.law.uoregon.edu/support/comprec/compreq.shtml>>. At Dean Perritt's Chicago-Kent College of Law, only those students who elect to participate in that law school's E-Learn program are required to own laptops. Similar to the University of Oregon, Chicago-Kent includes the cost of laptops into a student's financial aid package. See <<http://www.kentlaw.edu/academics/elearn.html>>. Presumably, given Chicago-Kent's progressive posture on law and technology, it actively encourages its other students to possess computers.

30. A reliable number eludes. Common sense and experience suggest to me, at least, that it is far from the exception anymore. For a related discussion about the importance of students' active engagement in the law school process, see, e.g., Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1 (1996); Michael L. Richmond, *Teaching Law to Passive Learners: The Contemporary Dilemma of Legal Education*, 26 CUMB. L. REV. 943 (1995-96).

Presumably, many—if not most—law schools provide students with access to terminals equipped with Internet access browsers. Most universities equip their students for little or no cost with e-mail accounts. This provides those students who do not own the necessary hardware or software with access to the Internet and, as a consequence, access to classroom listservs along with e-mail capabilities.

31. See Geist, *supra* note 16, at 169-71. It is notable that concurrent with increased use of moderated listservs by law professors for courses (deploying university-owned and operated servers) is increased litigation on issues surrounding an array of liability questions that arise out of the Internet technology. See, e.g., Kevin F. O'Shea, *The First Amendment: A Review of the 1997 Judicial Decisions*, 25 J.C. & U.L. 201 (assessing the implications of the case, *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329 (1997), on college and university's exposure to criminal sanctions for obscene material that finds its way onto college and university computers); Joseph R. Price, *Colleges and Universities as Internet Service Providers: Determining and Limiting Liability for Copyright Infringement*, 23 J.C. & U.L. 183 (1996) (discussing possible university copyright liability exposure due to their status as Internet service providers).

32. See, e.g., *Bohach v. Reno*, 932 F. Supp. 1232 (D. Nev. 1996); see also Scott A. Sundstrom, *You've Got Mail! (and the Government Knows It): Applying the Fourth Amendment to Workplace E-Mail Monitoring*, 73 N.Y.U. L. REV. 2064 (1998).

communicate.<sup>33</sup>

Some students enjoy the ready access to faculty that the Internet provides. Perhaps these students, for an array of reasons, prefer to interact with law professors or classmates with the distance provided over the Internet.<sup>34</sup> As a law professor I have come to appreciate the benefits of a medium that requires students to commit their queries to writing before posing them. I often find that the discipline of reducing a question to writing helps students focus, fuels clarity, and more quickly identifies related or collateral points requiring explication.

However, it is important to note that not all commentators agree on the utility of Internet interaction with law students.<sup>35</sup> Internet proponents point out that e-mail communication between professors and students has the potential to overcome some constraints presented by time and distance and, as a result, complement the educative processes by increasing student access to professors.<sup>36</sup> On balance, such a development—increased student and faculty interaction—is positive and should be encouraged as it can enhance the law school experience for many law students, administrators, and professors. On the other hand, some skeptics point out that this newly emerging electronic mode of communication may displace some “one-to-one” student-faculty conferences and discussions.<sup>37</sup> That is, rather than supplement important face-to-face contact between student and faculty, e-mail or electronic communication may supplant such contact. If so, the development of e-mail may increase one form of communication at the expense of another. The true threat posed by increased reliance on e-mail interaction, at least to one commentator, “lies in an almost insidious loss of the sense of community.”<sup>38</sup> The comparatively depersonalized Internet (or e-mail) communication threatens to further isolate law students, particularly the less experienced first-year law students.<sup>39</sup>

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33. See *Uniden America Corp. v. Ericsson, Inc.*, 181 F.R.D. 302 (M.D.N.C. 1998) (civil case); *New York v. Jovanovic*, 676 N.Y.S.2d 392 (Sup. Ct., N.Y. County 1997) (rape defendant sought to discover victim's e-mail to evidence past sexual conduct).

34. Some commentators advance another benefit, arguing that Internet listserv discussion groups “help counteract the unfortunate tendency for classroom discussion to be dominated by only a few students.” Richard Warner et al., *Teaching Law with Computers*, 24 RUTGERS COMPUTER & TECH L.J. 107, 150 (1998).

35. Compare Geist, *supra* note 16, at 143 (speaking positively of the Internet's role in law schools), with Robert H. Thomas, “*Hey, Did You Get My E-Mail?*” *Reflections of a Retro-Grouch in the Computer Age of Legal Education*, 44 J. LEGAL EDUC. 233 (1994) (presenting a dissenting view about the benefits of increased technology in legal education).

36. See Geist, *supra* note 16, at 160 (extolling the speed and convenience of e-mail).

37. See Thomas, *supra* note 35, at 238.

38. *Id.* at 242.

39. See *id.* at 244-45 (arguing that “being a lawyer, thinking like a lawyer, is an intensely human enterprise” and that over-reliance on impersonal modes of communication erodes the human dimension.).

#### *D. Law School Building Architecture*

The influence of emerging technology in general and the Internet in particular becomes quite evident for those charged with the task of helping design new law school facilities or re-model existing physical facilities.<sup>40</sup> Assigned the daunting task of designing a new law school facility, a faculty or, more likely, a faculty committee can spend numerous hours thinking and re-thinking assumptions about what a law school building should look like and how it should function. Faculty members' perceptions about what legal education should look like inform their opinions of what designs for new law school buildings should look like. The stakes are exceptionally high as the opportunity to design new law school buildings comes around, if a law professor is lucky, perhaps once during a career.

Paramount to law school building design are questions concerning what directions existing, emerging, and wholly unforeseen technological forces will take legal education. The magnitude of the influence technology exerts on the physical and conceptual design of a law school building will likely surprise those who have not had occasion to consider the issue directly. To take one extreme hypothetical, suppose "technocrats" argue that in the not-too-distant future virtual libraries will render obsolete libraries as we now know them. What is a responsible response to such an argument by a law faculty building committee? After all, many law schools are built with a desired or contemplated useful life of, say, thirty years. Most American law school libraries occupy, on average, anywhere between thirty-three to fifty percent of a law school's total square footage.<sup>41</sup> Obviously, it is difficult to overstate the importance of decisions concerning a law library to a law school. Should law schools simply forego constructing a library on the hunch that the technocrats' prediction proves correct? If the collective hunch is correct, the faculty looks like a collection of geniuses; if wrong, the faculty looks beyond foolish. It would have either constructed a "dinosaur" of a law school building perhaps even before the concrete dries or it would have constructed a building without an essential part—a library. Neither alternative is particularly attractive.

#### *E. Bluebook*

Another small but significant mark of the Internet's growing influence in the legal academy is that even the venerable *Bluebook*, the bane of all too many first-year and law review students, now formally recognizes the Internet's influence. Specifically, Rule 17.3.3 ("Internet Sources") in the current edition of the *Bluebook* provides citation form guidance for Internet sources.<sup>42</sup> Moreover, the

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40. By way of full disclosure, I had the good fortune of serving for two years on a law school building committee.

41. I am grateful to James F. Bailey, III, Director of Law Library, Indiana University School of Law—Indianapolis, for his assistance in formulating this rough estimate.

42. See THE BLUEBOOK, Rule 17.3.3, at 124 (16th ed. 1996). It is perhaps notable that the Bluebook expressly discourages citation to Internet sources because of their "transient nature." *Id.*

*Bluebook* now includes citation form guidance for journals that appear only on the Internet.<sup>43</sup>

#### *F. How to Assess These Changes*

Having briefly described a few examples of how the Internet has already influenced law schools, it is useful to return to my original queries. Is it possible to fairly characterize the magnitude or degree of change to legal education traceable to the Internet? Moreover, how have these changes altered the production and delivery of legal education? Finally, has legal education's dabbling in the brave new world of Internet and cyberspace generated new gaps between law schools and their students and among law students?

Firm answers to these questions, if they exist, are elusive. On the other hand, opinions are plentiful. What follows are the latter. Despite fast-moving changes surrounding law schools, commentators note that the degree to which such changes have penetrated law schools and legal education is not yet sufficient to define a "Web culture."<sup>44</sup> That is not to say that law schools, students, professors, and legal education have not been influenced by the Internet. However, the magnitude of influence at most law schools does not yet appear to have reached a level sufficient to dislodge the general character of law schools or legal education. The core of legal education appears to have proceeded through much of the Twentieth Century remarkably intact. Consequently, because the Internet's overall influence thus far on law schools and legal education cannot fairly be described as major, distributional or equity concerns for students lacking Internet capability or access flowing from the increased deployment of Internet technology appear neither significant nor systemic, at least at this juncture. Of course, the lack of any significant distributional or equity problems may only reflect the reality that Internet technology has not yet penetrated into the core of law students' daily lives. However, the Internet's role in legal education will certainly increase over time. Consequently, the relative absence of distributional or equity problems today is no guarantee that such problems will not emerge in the future.

Hindsight provides some assistance in assessing the Internet's past and present roles in legal education. However, hindsight falls short with respect to important aspects in this context. It does not answer the counterfactual question of what law schools and legal education would look like today but for the Internet. Finally, hindsight does not reflect changes already in place but not yet noticeable, nor does it reveal influences on legal education that have not yet emerged. Despite these imperfections, a quick glance backward illuminates discernable changes to legal education, however small or large, that have already manifested. This glance backward also provides some insight into future changes to legal education flowing from increased deployment of the Internet.

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43. See *supra* note 22 and accompanying text.

44. Geist, *supra* note 16, at 159-60 (arguing that a Web culture for law schools is still at least "several years" from fruition).

## II. CHANGES LIKELY TO BE IMPORTANT IN THE FUTURE

By figuratively turning one's gaze from legal education's past and present to its future, particularly how that future might be further shaped by the Internet, two immediate points quickly emerge. First, existing changes, including the few I have identified above, will continue to evolve. Second, new changes and influences will emerge. Among the potentially vast number of possible changes, one stands out starkly—distance learning. The Internet makes distance learning a much more viable proposition for law schools. Because of its potential import to legal education, I will limit my discussion of future changes to distance learning's potential influence on legal education.

### A. Distance Learning

It is important to realize that the term "distance learning," at least as it is bandied about within the context of legal education, can mean vastly different things to different people. Distance learning includes continuing legal education programs, such as those in states where Continuing Legal Education is required, that involve satellite transmission of instruction generated from one site and delivered to (potentially) many others. Distance learning is also used to describe nascent programs such as these at Chicago-Kent College of Law ("Chicago-Kent"), ably described by its dean in his Article. Chicago-Kent proposes to begin with an Internet "enhanced" evening division program in the fall of 1999.<sup>45</sup> From what Dean Perritt describes, however, Chicago-Kent intends to enhance the traditional legal education paradigm with Internet technology. Regardless, it is axiomatic that in virtually all conceptions of "distance learning" the Internet will serve as an integral component.

Distance learning can also mean much more, and recent announcements offer a glimpse at potentially how much more. For example, the Regent University School of Law recently petitioned the American Bar Association's ("ABA") Section of Legal Education, the office that performs many of the law school accreditation tasks, for recognition of a graduate level international taxation degree to be completed entirely on-line.<sup>46</sup> Bolder still, Kaplan Educational Centers, a for-profit corporation, recently announced plans to launch a new law school that will provide instruction exclusively over the Internet.<sup>47</sup>

At this juncture how the legal education establishment will respond to the forces of technology is anyone's guess. Accreditation will be one early vehicle for the ABA and law schools to shape, traject, or re-traject legal education's present and future course.

One preliminary sign—a memorandum from James P. White, the ABA's Consultant on Legal Education to the deans of ABA-approved law

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45. See Perritt, *supra* note 1, at 272.

46. See generally Randall T. Shepard, *Our Evolving Policy on Distance Learning*, SYLLABUS (ABA Sec. Legal Educ. and Admissions to the Bar) Winter 1999, at 5.

47. See *id.*

schools—evidences caution with respect to distance education's application to the legal education setting.<sup>48</sup> The memorandum contains a brief discussion of the underlying principles for distance legal education as well as a set of temporary guidelines.<sup>49</sup>

### *B. Will "Virtual" or Distance Legal Education Be Good for Students?*

To some, perhaps many, the value of the Internet in law school classrooms in general and distance education in particular seems self-evident.<sup>50</sup> Further expansion of distance learning into the legal education market will certainly benefit some interests. Whose interests will be advanced is not entirely clear. One clear winner would be the Internet industry. No doubt the Internet industry salivates at the prospect of formal or "traditional" legal education migrating onto the Internet. Rather than endeavor to assess the array of possible "winners" and "losers," the focus of this Article is to consider whether the Internet will be good for law schools and legal education. My even narrower focus dwells on the interests of law students.

Good reasons support the optimism that flows from Dean Perritt's Article about the Internet's potential for influencing and changing how legal education is delivered. On a purely visceral level, it is difficult to imagine how law students and law schools would not be assisted by a well-crafted integration of the Internet. Indeed, it is already difficult to imagine a law library at any accredited American law school that lacks Internet access. The Internet and access to it by law students and professors are already indispensable. Because the Internet has become the world's information highway, legal educators need to understand how it can be used to improve legal education. Even if it does not fulfill its current promise, the medium is already important enough to warrant greater integration into the various aspects that comprise legal education. Also, as Dean Perritt makes clear, the Internet is changing how lawyers function as professionals and how they serve clients. Law schools need to be aware of and, ideally, ahead of such changes. As a result, all law students, but particularly those preparing to enter the constantly evolving legal market as attorneys, would be well served to acquaint themselves as much as possible with the Internet and related technology. Law students who actively ignore the Internet during law school risk handicapping themselves as newly-minted attorneys.<sup>51</sup> Law firms will soon come to expect new associates to be as familiar with e-mail as they are with

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48. See Memorandum from James P. White, Consultant on Legal Education to the American Bar Association, to Deans of ABA Approved Law Schools (May 6, 1997) (on file with the *Indiana Law Review* or available on-line at: <<http://www.abanet.org/legaled/distance.html>>).

49. See *id.*

50. Dean Perritt's teaching is one prime example. But, as he makes perfectly clear in his Article, Dean Perritt views distance learning as one of an array of possible tools to train law students. See Perritt, *supra* note 1, at 266-67.

51. For a discussion about how law practices now incorporate Internet technology, see, e.g., Mark Pruner, *The Internet and the Practice of Law*, 19 PACE L. REV. 69 (1998).

Shepherds. Consequently, the belief that the Internet will change legal education should surprise few.

1. *Pedagogical Issues*.—As important as the Internet may prove to be in the future, at least two issues warrant careful thought. First, legal educators need to get a better sense about whether the Internet will assist law students to learn and, if so, how. Those who study technology's role in education (not legal education per se, but rather education generally) readily acknowledge that no one really knows whether the technology deployed in today's classrooms help students learn better or more.<sup>52</sup> Empirical evidence on the efficacy of virtual classrooms is sketchy, at best, and severely limited by a paucity of data.

One prominent example involves Professor Andrea Johnson who taught, on a pilot study basis, an advanced telecommunications course simultaneously to students at the California Western School of Law in San Diego and the Cleveland-Marshall College of Law in Cleveland. The course enrolled eight law students from both schools and incorporated Internet, teleconferencing and videoconferencing, e-mail, and an electronic casebook. Notably, Professor Johnson, acutely aware of the pedagogical ground she was breaking, employed a "control" telecommunications course, which met in a regular law school setting in the conventional manner. On the basis of her experience, Professor Johnson concluded that enhanced technology served as a significant supplement to the student learning processes, with students in the Internet section of telecommunications law exhibiting the same or deeper understanding of the covered material.<sup>53</sup> Clearly, a single case study with the potential for self-selection bias limits substantially what can properly be inferred. But it will be from such experiments that, over time, a helpful empirical base will emerge.

2. *Distributional and Equity Issues*.—A second set of concerns relates to distributional and equity concerns stemming from increased use of distance learning in legal education. How differences between "traditional" law school instruction and instruction provided through distance learning technologies will be distributed among law students is not entirely clear. One crucial, potential difference is in instructional quality. For purposes of this discussion, I will construe instructional quality wholly in terms of the efficacy of student learning and comprehension of the material presented. Justice Ginsburg recently offered her perceptions of instructional quality differences distinguishing traditional and distance learning in legal education.<sup>54</sup> Because Justice Ginsburg feels that so

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52. For a fuller articulation of this point, see, e.g., David Skinner, *Computers: Good for Education?*, 128 PUB. INTEREST 98 (1997) (discussing evidence of computers' efficacy in the K-12 educational setting).

53. For a fuller description of this experiment, see Johnson, *supra* note 8, at 245. Interestingly, Professor Johnson, one who is clearly in the vanguard of incorporating the Internet into legal education, concludes that "[d]istance learning and technology will never replace professors or negate traditional teaching methods. The dynamics of human interaction and feedback are too critical to the development of legal skills and problem-solving." *Id.* See also Geist, *supra* note 16, at 177 nn.174-77.

54. See Katherine S. Mangan, *Justice Ginsburg Raises Questions About Internet-Only Law*

much of legal education and practice is a shared, genuinely interactive endeavor, she feels that instructional quality is threatened for law students exposed only to distance learning methodologies.<sup>55</sup>

Cost might be another variable distinguishing traditional learning from distance legal instruction. Indeed, one of distance learning's key selling points pivots on its relative cost-effectiveness.<sup>56</sup> It will be interesting to see how law schools price distance learning credit hours, especially in relation to traditionally taught credit hours. Given limitations imposed by classroom size and faculty fatigue, ceilings exist that effectively cap how many students a law professor can teach in the traditional classroom format. No analogous limitation exists for distance learning.

The quality and cost variables may well interact. That is, should the quality of instruction delivered through distance learning programs fall short of the quality level achieved by the traditional classroom format, whether quality differential is rooted in reality or merely perception, the distance learning program might be priced lower to reflect the quality differential. Lower price for lower quality legal education may result in the calcification of law school "tiers." Such tiers, should their roots deepen, may manifest in terms of student self-selection. What may culminate is a law school within a law school with less (or more, depending on one's perspective) desirable distance learning program serving a certain student profile and the traditional law school program serving yet another.

It is certainly conceivable that such differentiation might generate net educational gains. Some students might benefit from an alternative to today's law school environment. It is assuredly true that the pool of potential law students increases when geographic barriers to legal education fall. The questions are provocative enough to generate excitement and anticipation about novel programs such as the one that Dean Perritt describes.

Possible distributional and equity issues also flow from law schools' more general increased deployment of the Internet and related technology. Ethical considerations flow from access issues relating to the requisite technology, especially hardware. What affirmative steps, if any, should law schools take to maximize access to Internet technology for all students and thereby blunt possible advantages enjoyed by some students over others? Ideally, law schools would take steps to ensure that their students do not artificially organize into the technological "haves" and "have nots." Moreover, it is obvious that even among students comfortable and fluent in cyberspace some will simply take a greater interest in it than others. That, of course, is fine and raises no structural

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Schools (visited Sept. 16, 1999) <<http://chronicle.com/free/99/09/99091302t.htm>>.

55. See *id.*

56. See, e.g., Johnson, *supra* note 8, at 227 n.53 (arguing that law schools will soon follow the lead taken by colleges and universities in exploring distance education programs partly in response to enduring pressures to contain costs). For a related argument about the cost-effectiveness of incorporating Internet technologies into traditional law firms, see, e.g., Pruner, *supra* note 51, at 79.

problems. Potential problems do arise, however, if it turns out that some students are structurally advantaged over others due solely to matters relating to access to the Internet and related technologies. If some of the Internet's strongest supporters are correct—and the Internet stands ready to revolutionize the way law is taught—then those without access to the Internet might be harmed.

In many ways, the personal computer market may help minimize potential distributional issues. As the cost of personal computers—hardware and software—continues to fall, law students' economic barriers to the Internet similarly fall.<sup>57</sup> Perhaps those law students lucky enough to grow up in well-to-do households with easy and early access to computers and Internet technology might benefit from a slight, initial advantage over law students not as fortunate. But the skills necessary to successfully avail oneself of the Internet are ones that can be picked up with relative ease and speed. Also, as some law schools are already doing, personal computer costs can be folded into a student's overall loan package.<sup>58</sup> Many of the needs of students whose financial situations preclude them from owning their own Internet accessible personal computer can be met through law school-owned computers placed in public locations throughout a law school, especially in a law library. Finally, for those students who might lack the background or familiarity with Internet software or hardware, law schools can organize training sessions to equip such students, or at least those students desiring such training. While important equity issues linger, clear thinking and strategic planning by a law school can adequately and responsibly address many of these issues.

In some ways the nub of the larger issue concerning distance learning education delivered over the Internet might resemble a burden placement question. Do legal educators need to affirmatively persuade that the Internet should *not* be an integral part of American legal education because distributional and equity issues will arise? Or, rather, should those promoting the Internet bear the initial burden of demonstrating why and how it can assist the legal education processes through such programs as distance learning. Given the uncertainty of our current knowledge base, the burden placement may well be determinative. In time, and with some effort and foresight, however, the placement issue can become less important.

## CONCLUSION

As Dean Perritt correctly notes, the Internet is changing American law schools and, consequently, how we educate and train law students. Internet technology has already seeped into law school classrooms as well as law libraries. Most law students now arrive at law school already Internet savvy and possessing relatively sophisticated cyberspace navigational skills. Increasingly, they lever these skills in their efforts to learn the law, particularly as the skills

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57. See Marc Friedman & Kenneth R. Buys, '*Infojacking: Crimes on the Information Superhighway*, 13 COMPUTER L. 1, 2 (noting computers' lower cost and increased availability).

58. See *supra* note 29.

relate to manipulating vast sources of information. The Internet's influence within law schools will assuredly increase over time.

The Internet's increased influence on law schools and legal education also is assured in part by forces surrounding the legal academy. Notably, the Internet continues to fuel explosive growth in electronic commerce. Information is becoming increasingly Internet friendly. As a result, many economic, political, and social institutions now routinely harness Internet technology. Moreover, law firms that serve such clients or find a need to access information sources realize the need to tap into the Internet simply to remain competitive. Many of the attorneys working in law firms today—especially the younger ones—enter law firms already comfortable working with various Internet technologies. Those not yet comfortable with Internet technology might find themselves at a distinct disadvantage. With all such changes occurring around law schools it is inevitable that law schools and legal education will adjust to a newly emerging environment.

Consequently, I find little with which to quarrel in Dean Perritt's Article. One not-so-subtle thrust of his Article is that American law schools need to catch up with the fast-moving Internet technologies and find ways to use them that will enhance legal education. Because I am largely persuaded by Dean Perritt's arguments, my Article dwells on questions that flow from a world of law schools that increasingly uses Internet technologies. Assuming that Dean Perritt's observations about the Internet are correct, the implications for legal education in the future are important and warrant careful consideration. The pedagogical value created by Internet-related law teaching tools and how law schools will incorporate these new tools generate important questions. Distance learning is one obvious avenue that will receive increased attention from legal educators in the future. Finally, while greater use of Internet technologies may succeed in helping law schools close technological gaps, whether such gaps can be closed in a manner that avoids creating new gaps endures as a possibly important issue. The trick, of course, will be for law schools to lever the Internet's desirable attributes in a way that minimizes the costs, both direct and collateral. I remain optimistic that a successful balance can be achieved. However, my optimism does not dislodge my concerns over a potential set of distributional and equity issues. These issues certainly can be addressed in a responsible manner. The Internet has spawned issues that will warrant attention from legal educators, but has also helped thrust law schools into the new millennium.

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## NOTES

### ***IN RE LINDSEY: A NEEDLESS VOID IN THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE***

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#### INTRODUCTION

*"I did not have sexual relations with that woman—Miss Lewinsky."*<sup>1</sup>

When President Clinton looked straight into the camera and spoke these infamous words in January 1998, perhaps the only other person who knew the misleading nature of this statement was Bruce Lindsey, Deputy White House Counsel and Assistant to the President. If President Clinton had not admitted to an "inappropriate" relationship with Monica Lewinsky in August 1998,<sup>2</sup> prior to *In re Lindsey*,<sup>3</sup> the government attorney-client privilege would have protected Bruce Lindsey's knowledge of this relationship, despite the fact that Independent Counsel Kenneth Starr issued a subpoena to Bruce Lindsey in the course of a criminal investigation. However, as this Note will demonstrate, *In re Lindsey* has changed the status of the government attorney-client privilege.

The President, members of Congress, and legal clients have consistently enjoyed protection for their confidential communications via the Executive Privilege,<sup>4</sup> Speech and Debate Clause,<sup>5</sup> and attorney-client

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1. President Clinton denied he had a sexual relationship with Monica Lewinsky on Monday, January 26, 1998. *See 'I Never Told Anybody to Lie,'* OTTAWA SUN, Mar. 29, 1998, at 26.

2. President Clinton admitted he had an "inappropriate" relationship with Monica Lewinsky on Monday, August 17, 1998. *See 'I Misled People, Even My Wife,'* OTTAWA SUN, Aug. 18, 1998, at 4.

3. 158 F.3d 1263 (D.C. Cir.) (per curiam), *cert. denied*, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.).

4. The executive privilege is a "broad, constitutionally derived privilege that protects frank debate between President and advisers." *Id.* at 1285 (Tatel, J., dissenting) (citing United States v. Nixon, 418 U.S. 683, 708 (1974)).

5. The Speech and Debate Clause states that Senators and Representatives shall be privileged for "[a]ny Speech or Debate in either House, [and] they shall not be questioned in any other Place." U.S. CONST. art. I, § 6.

privilege;<sup>6</sup> however, government attorneys and officials have only periodically received protection for their confidential communications.<sup>7</sup> This inequality has primarily derived from the special duty of government attorneys to uphold the public trust reposed in them, and has produced the government attorney-client privilege, a creature of common law that grew out of the traditional attorney-client privilege.<sup>8</sup> Courts have sporadically applied this privilege, and until *In re Lindsey*, many commentators questioned the viability of the government attorney-client privilege in a court of law.<sup>9</sup> *In re Lindsey* acknowledged the privilege's existence; however, it restricted the privilege by dissolving protection for confidential communications between government attorneys and officials in the context of a criminal investigation.<sup>10</sup>

Commentators have mixed reactions to *In re Lindsey*. Some support an absolute government attorney-client privilege that would protect candor and frank communications that the attorney-client privilege embodies in every other context.<sup>11</sup> Others support a qualified government attorney-client privilege that stresses the public's interest in uncovering illegality among its elected and appointed officials. *In re Lindsey* chooses the qualified government attorney-client privilege. Similar to the executive privilege, the government attorney-client privilege evaporates when a criminal investigation ensues. Unlike the executive privilege, absolute protection does not extend when the subject matter sought to be exposed relates to military, diplomatic, or sensitive national security secrets. The court's failure to address the possibility of revealing military, diplomatic, or sensitive national security secrets has left a void in the *In re Lindsey* decision that needs to be filled.

Part I of this Note outlines the attorney-client privilege, distinguishes it from the principle of confidentiality and the executive privilege, and provides the derivation and scope of the government attorney-client privilege. Part II of this Note analyzes *In re Lindsey* and the cases leading up to it, *In re Grand Jury*

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6. See FED. R. EVID. 501. “[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” *Id.*

7. See *News & Observer Publ'g Co. v. Poole*, 412 S.E.2d 7, 17 (N.C. 1992) (“So far this Court has not recognized an attorney-client privilege for public entity clients, and it is unclear whether the traditional privilege should be so extended. Most courts that have applied such a privilege have not considered its origin but have merely assumed it exists.”) (citation omitted).

8. See *In re Lindsey*, 158 F.3d at 1273.

9. See *Loser: Attorney-Client Privilege*, *LEGAL TIMES*, Dec. 22/29, 1997, at 15 (quoting former White House Counsel C. Boyden Gray, “I’m not sure there is any such thing as [a] governmental attorney-client privilege now.”).

10. See *In re Lindsey*, 158 F.3d at 1278.

11. See Ruth Marcus, *Court Rejects Privilege Claim*, *WASH. POST*, July 28, 1998, at A1.

*Subpoena Duces Tecum*<sup>12</sup> and *In re Grand Jury Proceedings*.<sup>13</sup> Part III visits the aftermath of *In re Lindsey*, particularly the legal commentary and the alleged repercussions this decision may produce for government attorneys and officials. Part IV addresses a proposed alteration to *In re Lindsey* and offers its own modification to the government attorney-client privilege—extension of absolute protection to confidential communications containing military, diplomatic, or sensitive national security secrets. Finally, this Note concludes with recommendations for government attorneys and officials in light of the restrictions *In re Lindsey* has placed on the government attorney-client privilege.

## I. EVOLUTION OF THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE

### A. The Attorney-Client Privilege

Federal Rule of Evidence 501, the foundation for the attorney-client privilege,<sup>14</sup> states that “the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.”<sup>15</sup> The attorney-client privilege, the oldest privilege for confidential communications at common law, furnishes protection to communications made between client and attorney by forbidding disclosure.<sup>16</sup> By utilizing the attorney-client privilege, a client may refuse to disclose confidential communications and may also prevent his attorney from disclosing confidential communications that were made for the purpose of obtaining legal guidance.<sup>17</sup> The identity of a client, underlying facts, and incidental

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12. 112 F.3d 910 (8th Cir.), *cert. denied*, Office of President v. Office of Indep. Counsel, 521 U.S. 1105 (1997).

13. 5 F. Supp.2d 21 (D.D.C.), *aff'd in part, rev'd in part sub nom. In re Lindsey*, 158 F.3d 1263 (D.C. Cir.) (per curiam), *cert. denied*, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.).

14. The elements of the attorney-client privilege are: (1) The asserted holder is or sought to become a client; (2) the person to whom the communication was made is a member of the bar, or his subordinate, and, in connection with the communication, is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed by the client, without the presence of strangers, and for the purpose of securing primarily either a legal opinion, legal services, or assistance in some legal proceeding; (4) the communication was not for the purpose of committing a crime or tort; and (5) the privilege has been claimed and not waived by the client. See *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

15. FED. R. EVID. 501.

16. See Michael J. Chepiga, *Federal Attorney-Client Privilege and Work Product Doctrine*, in CURRENT DEVELOPMENTS IN FEDERAL CIVIL PRACTICE 1998, at 473, 476 (PLI Litig. & Admin. Practice Course Handbook Series No. 583, 1998).

17. See PROPOSED FED. R. EVID. 503(b). Although this rule has not been enacted, it has been recognized as “a powerful and complete summary of black-letter principles of lawyer-client privilege.” 3 WEINSTEIN’S FEDERAL EVIDENCE § 503.02, at 503-10 (McLaughlin 2d ed. 1997).

communications are generally not protected by the attorney-client privilege,<sup>18</sup> but an exception applies when the person asserting the privilege can show the possibility that disclosure would implicate the client in the very criminal activity for which the client sought legal advice.<sup>19</sup>

Although privileges generally are in “derogation of the search for truth”<sup>20</sup> and contravene the fundamental maxim that the “public . . . has a right to every man’s evidence,”<sup>21</sup> the attorney-client privilege “promotes the attorney-client relationship, and, indirectly, the functioning of our legal system, by protecting the confidentiality of communications between clients and their attorneys.”<sup>22</sup> As a consequence, the attorney-client privilege promotes the “broader public interests in the observance of law and administration of justice.”<sup>23</sup> As a result of the conflicting principles inherent in seeking out the truth *and* protecting confidential communications between attorneys and clients, courts have determined that the attorney-client privilege is not absolute and must be strictly construed. Therefore, the privilege is recognized “only to the very limited extent that permitting a refusal to testify . . . has a *public good transcending* the normally predominant principle of utilizing all rational means for ascertaining truth.”<sup>24</sup> This public good must be shown “with a high degree of clarity and certainty” in order to apply the attorney-client privilege.<sup>25</sup>

In addition to the public good requirement, other limitations exist in asserting the attorney-client privilege. The crime-fraud exception exempts from the attorney-client privilege communications made in furtherance of future or ongoing criminal or fraudulent conduct, including other wrongful conduct such as intentional torts.<sup>26</sup> Another example is the at-issue exception, which provides that a party may have effectively waived the attorney-client privilege through an

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18. See Chepiga, *supra* note 16, at 479.

19. See *id.* (citing *In re Grand Jury*, 631 F.2d 17, 19 (3d. Cir. 1980)).

20. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

21. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 917-18 (8th Cir.), *cert. denied*, *Office of President v. Office of Indep. Counsel*, 521 U.S. 1105 (1997).

22. *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1428 (3d. Cir. 1991).

23. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

24. *In re Grand Jury Proceedings*, 5 F. Supp.2d 21, 30 (D.D.C.) (emphasis added), *aff’d in part, rev’d in part sub nom. In re Lindsey*, 158 F.3d 1263 (D.C. Cir.) (per curiam), *cert. denied*, *Office of President v. Office of Indep. Counsel*, 119 S. Ct. 466 (1998) (mem.) (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)). See also *In re Lindsey*, 158 F.3d at 1268 (“[F]ederal courts do not recognize evidentiary privileges unless doing so ‘promotes sufficiently important interests to outweigh the need for probative evidence.’”) (citation omitted).

25. *In re Sealed Case*, 148 F.3d 1073, 1076 (D.C. Cir.), *cert. denied*, *Rubin v. United States*, 119 S. Ct. 461 (1998).

26. See Chepiga, *supra* note 16, at 485; see also *United States v. Zolin*, 491 U.S. 554, 561 (1989) (holding that the general policy for the crime-fraud exception is “to assure that the ‘seal of secrecy’ between lawyer and client does not extend to communications made for [the] purpose of getting advice for [the] commission of a fraud or a crime”) (citations omitted).

affirmative act, such as filing suit, that puts protected information at issue by making it relevant to the case.<sup>27</sup> Finally, the self-defense exception allows an attorney to override the client's privilege in order to defend himself against accusations of wrongful conduct.<sup>28</sup> These exceptions ensure that the truth is revealed in situations where a compelling public good outweighs a refusal to testify.

#### *B. The Principle of Confidentiality and the Executive Privilege*

The principle of confidentiality is often entangled with the attorney-client privilege.<sup>29</sup> The principle of confidentiality is rooted in professional ethics while the attorney-client privilege is rooted in the law of evidence.<sup>30</sup> As to the principle of confidentiality, Model Rule of Professional Conduct 1.6 states:

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . . A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or to establish a claim or defense on behalf of the lawyer . . . .<sup>31</sup>

The critical difference between the attorney-client privilege and the principle of confidentiality is that the attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness while the principle of confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.<sup>32</sup> Furthermore, the principle of confidentiality applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its

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27. See Chepiga, *supra* note 16, at 488; see also Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975) (holding that the at-issue exception provides that a party may have waived the privilege when (1) the assertion of the privilege was a result of some affirmative act, such as filing suit; (2) through this affirmative act, the asserting party put protected information at issue by making it relevant to the case; and (3) application of the privilege would deny the opposing party access to information vital to its defense).

28. See Chepiga, *supra* note 16, at 490; see also Meyerhofer v. Empire Fire & Marine Ins., 497 F.2d 1190, 1194-96 (2d Cir. 1974) (holding that an attorney who had been named as a defendant in a class action brought by the purchasers of the securities who claimed that the prospectus contained misrepresentations had the right to make an appropriate disclosure to counsel representing the stockholders as to his role in the public offering).

29. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 5 (1995) ("The principle of confidentiality is given effect in *two related* bodies of law, the attorney client privilege . . . and the rule of confidentiality . . . .") (emphasis added).

30. See *id.*

31. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1995).

32. See *id.* at cmt. 5 (1995).

source.<sup>33</sup>

The executive privilege is also confused with the attorney-client privilege. The executive privilege is a “broad, constitutionally derived privilege that protects frank debate between President and advisers”<sup>34</sup> while the attorney-client privilege is a much narrower privilege that emanates from the common law. Although the President may utilize the attorney-client privilege, the executive privilege is exclusive to the President.

The landmark case *United States v. Nixon*<sup>35</sup> carved out the executive privilege from the U.S. Constitution. The Court created the executive privilege in part to equip the President with a comparable protection that members of the House and Senate are afforded under the Speech and Debate Clause<sup>36</sup> in the U.S. Constitution.<sup>37</sup> In creating this privilege, the Court reasoned that the “President’s need for complete candor and objectivity from advisers calls for great deference from the courts.”<sup>38</sup> However, the Court fashioned an exception to the executive privilege by holding that the executive privilege is not absolute and must ultimately yield to the specific need for evidence in a criminal investigation, unless the investigation encompasses military, diplomatic, or sensitive national security secrets.<sup>39</sup>

### C. Derivation and Scope of the Government Attorney-Client Privilege

In addition to the attorney-client privilege, many other privileges have been recognized, such as the psychotherapist-patient privilege,<sup>40</sup> husband-wife privilege,<sup>41</sup> and corporate attorney-client privilege.<sup>42</sup> A more recent addition to this list is the government attorney-client privilege. “Courts, commentators, and government lawyers have long recognized a government attorney-client privilege

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33. See *id.*

34. *In re Lindsey*, 158 F.3d 1263, 1285 (D.C. Cir.) (Tatel, J., dissenting), cert. denied, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.) (citing *United States v. Nixon*, 418 U.S. 683, 708 (1974)).

35. 418 U.S. 683 (1974).

36. The Speech and Debate Clause states that Senators and Representatives shall be privileged for “[a]ny Speech or Debate in either House, [and] they shall not be questioned in any other Place.” U.S. CONST. art. 1, § 6.

37. See *Nixon*, 418 U.S. at 704.

38. *Id.* at 706.

39. See *id.*

40. See *Jaffee v. Redmond*, 518 U.S. 1 (1996) (observing that this privilege would serve the public interest by facilitating the provision of appropriate treatment for individuals who suffer from mental or emotional problems); PROPOSED FED. R. EVID. 504.

41. See *Trammel v. United States*, 445 U.S. 40 (1980) (recognizing two distinct spousal privileges: testimonial and communications); PROPOSED FED. R. EVID. 505.

42. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (extending the attorney-client privilege to communications made between corporate counsel and all-level corporate employees, as long as the communications concern matters within the scope of employment).

in several contexts.”<sup>43</sup> Although this privilege was not universal and guaranteed prior to *In re Lindsey*,<sup>44</sup> case law, litigation concerning the Freedom of Information Act, and secondary authority did endorse a comprehensive government attorney-client privilege.

Although there are no Federal Rules of Evidence that acknowledge a government attorney-client privilege, precedent on this subject exists in both federal<sup>45</sup> and state<sup>46</sup> case law. An example of a federal case recognizing the government attorney-client privilege is *Green v. Internal Revenue Service*.<sup>47</sup> The district court, reiterating the Seventh Circuit, recognized the privilege on the basis of important underlying policy considerations.<sup>48</sup> The Seventh Circuit had stressed that the government attorney-client privilege promotes frank

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43. *In re Lindsey*, 158 F.3d 1263, 1268 (D.C. Cir.) (per curiam), *cert. denied*, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.).

44. See 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5475, at 128 (1986) (“Whatever the merits of the arguments for and against the governmental privilege, it seems *likely* that *some* form of privilege for governmental clients will be recognized by federal courts . . . .”) (emphasis added).

45. See, e.g., *Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998) (assuming the government attorney-client privilege exists, but never explicitly deciding); *In re Grand Jury Subpoena*, 886 F.2d 135 (6th Cir. 1989) (assuming that a governmental entity, such as a municipal corporation, may invoke the attorney-client privilege); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (dicta); *In re Polypropylene Carpet Antitrust Litig.*, 181 F.R.D. 680, 694 (N.D. Ga. 1998) (holding that the attorney-client privilege applies to a governmental entity when it seeks advice to protect personal interests and needs the same assurance of confidentiality so it will not be deterred from full and frank communications); *Scott Paper Co. v. United States*, 943 F. Supp. 489, 499 (E.D. Pa.), *aff'd*, 943 F. Supp. 501 (E.D. Pa. 1996) (“In claims of attorney-client privilege by an organization, such as a governmental agency or corporation, the privilege extends to those communications between the attorney and all agents or employees of the organization who are authorized to act or speak for the organization in relation to the subject matter of the communication.”).

46. See, e.g., *People ex rel. Dep't of Pub. Works v. Glen Arms Estate, Inc.*, 41 Cal. Rptr. 303, 310 (Cal. Ct. App. 1964) (holding that the privilege for governmental agencies is determined in the same way as the privilege for private corporations); *City of Orlando v. Desjardins*, 493 So.2d 1027, 1029 (Fla. 1986) (finding an exception under state open-files statute); *District Attorney v. Board of Selectmen*, 481 N.E.2d 1128, 1130 (Mass. 1985) (finding an exception to the open-meeting law, but refusing to recognize an implicit exception for non-litigation consultation); *Minneapolis Star & Tribune v. Housing & Redevelopment Auth.*, 251 N.W.2d 620, 624-25 (Minn. 1976) (holding that state open-meeting laws implicitly exempt meetings between agency and lawyer for purposes of discussing pending litigation); *Matter of Grand Jury Subpoenas Duces Tecum Served by Sussex County Grand Jury on Farber*, 574 A.2d 449, 455 (N.J. Super. Ct. App. Div. 1989) (“[W]e are convinced that many of the considerations which underlie application of the attorney-client privilege to corporations militate strongly in favor of its extension to public entities.”).

47. 556 F. Supp. 79 (N.D. Ind. 1982), *aff'd*, 734 F.2d 18 (7th Cir. 1984).

48. See *id.* at 84.

communications among those who make meaningful decisions regarding governmental functions.<sup>49</sup> The Seventh Circuit had also recognized that the privilege was designed to shield from disclosure the mental processes of executive and administrative personnel.<sup>50</sup>

An example of a state case upholding the government attorney-client privilege is *Markowski v. City of Marlin*.<sup>51</sup> The Texas court extended the privilege to governmental entities because “a governmental body has as much right as an individual to consult with its attorney without risking the disclosure of important confidential information.”<sup>52</sup> The Texas court reasoned that because a governing body may consult privately with its attorney, logic prescribes that the information disclosed should be protected.<sup>53</sup> However, the Texas court mandated that a “checking” mechanism be applied to claims of the government attorney-client privilege.<sup>54</sup> In order to justify the privilege, the Texas court required the proponents to submit the alleged privileged documents or communications to an *in camera* inspection.<sup>55</sup>

Although a great deal of general case law exists, most of the law on the government attorney-client privilege has primarily developed from litigation<sup>56</sup> concerning exemption five of the Freedom of Information Act<sup>57</sup> (“FOIA”). Under this exemption, “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency”<sup>58</sup> are excused from mandatory disclosure to the public. “Exemption five does not itself create a government attorney-client privilege.”<sup>59</sup> Rather, it creates an effective government attorney-client privilege only “when the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests, and needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counselors.”<sup>60</sup>

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49. See *id.*

50. See *id.*

51. 940 S.W.2d 720 (Tex. App. 1997).

52. *Id.* at 726.

53. See *id.* at 727.

54. *Id.*

55. See *id.*

56. See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975); *Mead Data Ctr., Inc. v. United States Dep’t of Air Force*, 566 F.2d 242, 252-53 (D.C. Cir. 1977); *Porter County Chapter of Izaak Walton League v. United States Atomic Energy Comm’n*, 380 F. Supp. 630, 637 (N.D. Ind. 1974).

57. 5 U.S.C. § 552 (1994). The Freedom of Information Act is a “broadly conceived statute which seeks to permit public access to much previously withheld official information.” *Izaak Walton League*, 380 F. Supp. at 636.

58. 5 U.S.C. § 552(b)(5).

59. *In re Lindsey*, 158 F.3d 1263, 1269 (D.C. Cir.) (per curiam), cert. denied, *Office of President v. Office of Indep. Counsel*, 119 S. Ct. 466 (1998) (mem.).

60. *Id.* (quoting *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 863 (D.C.

The proposed, but never enacted, Federal Rule of Evidence 503 lends additional support for the government attorney-client privilege, and courts have often turned to it as evidence of the black-letter law.<sup>61</sup> Proposed Federal Rule 503 defines “client” for the purposes of the attorney-client privilege as a “person, public officer, or corporation, association, or other organization or entity, either public or private.”<sup>62</sup> The advisory committee’s notes to the proposed rule clarify that the attorney-client privilege extends to communications of governmental organizations.<sup>63</sup>

Finally, the Restatement (Third) of the Law Governing Lawyers advocates support for the government attorney-client privilege.<sup>64</sup> However, the commentary emphasizes that the privilege for governmental clients is much narrower than the attorney-client privilege due to statutory formulations, such as open-meeting and open-file statutes, that reflect a public policy against secrecy in many areas of governmental activity.<sup>65</sup>

As the above-mentioned authority reflects, the scope of the government attorney-client privilege was broad prior to *In re Lindsey*. It protected the processes by which a decision was reached, extraneous matters considered, contributing factors, and the role played by the work of others.<sup>66</sup> The government attorney-client privilege also protected “government documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.”<sup>67</sup> In certain circumstances, the government could even invoke this privilege with regard to state and military secrets.<sup>68</sup>

Although this privilege was broad, no legal precedent existed determining

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Cir. 1980)); *see also* Confidentiality of the Attorney General’s Communications in Counseling the President, 6 Op. Off. Legal Counsel 481, 495 (1982) (“[T]he privilege also functions to protect communications between government attorneys and client agencies or departments, as evidenced by its inclusion in the FOIA.”).

61. *See, e.g., In re Lindsey*, 158 F.3d at 1269.

62. PROPOSED FED. R. EVID. 503 (a)(1).

63. *See* PROPOSED FED. R. EVID. 503 advisory committee’s note.

64. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 (Proposed Final Draft No. 1, 1996) (“[T]he attorney-client privilege extends to a communication of a governmental organization . . . .”). The American Law Institute has approved the chapter of Proposed Final Draft No. 1 of the Restatement governing the attorney-client privilege. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 916 n.4 (8th Cir.), *cert. denied*, Office of the President v. Office of Indep. Counsel, 521 U.S. 1105 (1997) (citing 64 U.S.L.W. 2739 (1996)).

65. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 cmt. b (Proposed Final Draft No. 1, 1996).

66. *See Green v. IRS*, 556 F. Supp. 79, 84 (N.D. Ind. 1982), *aff’d*, 734 F.2d 18 (7th Cir. 1984) (citing *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966)).

67. JACOB MERTENS, JR., THE LAW OF FEDERAL INCOME TAXATION § 58A.34 (1997) (citing *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963)).

68. *See id.* (citing *E.W. Bliss Co. v. United States*, 203 F. Supp. 175 (N.D. Ohio 1961)).

whether this privilege applied in a criminal investigation.<sup>69</sup> The logical assumption, however, was that the government attorney-client privilege applied in criminal investigations because a court had never carved out an exception to the attorney-client privilege based solely on the type of proceeding in which a party claimed the privilege.<sup>70</sup> *In re Lindsey* marked a fundamental change in this assumption as it created an exception applicable only to government entities: no attorney-client privilege for criminal investigations.

## II. *IN RE LINDSEY AND ITS COMPANION CASES*

While the world's focus was on Monica Lewinsky and President Clinton, Independent Counsel Kenneth Starr, in his extended Whitewater investigation, was attempting to pierce the government attorney-client privilege. Although the cases discussed below are from the Eighth and D.C. Circuits, they have borrowed from each other and were ultimately combined to produce the holding in *In re Lindsey*: the government attorney-client privilege evaporates in the face of a federal grand jury subpoena.

### A. *In re Grand Jury Subpoena Duces Tecum*

*In re Grand Jury Subpoena Duces Tecum*,<sup>71</sup> decided by the Eighth Circuit on February 13, 1997, paved the way for *In re Lindsey*. In this case, the Special Division of the United States Court of Appeals for the District of Columbia, pursuant to the Independent Counsel statute,<sup>72</sup> ordered Kenneth Starr to investigate and prosecute matters "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc."<sup>73</sup> The Special Division also assigned Kenneth Starr to pursue evidence of "other violations of the law developed during and connected with or arising out of his primary investigation, known generally as 'Whitewater.'"<sup>74</sup> Pursuant to its investigation,

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69. See Lisa E. Toporek, "Bad Politics Makes Bad Law: A Comment on the Eighth Circuit's Approach to the Governmental Attorney-Client Privilege," 86 GEO. L.J. 2421, 2433 (1998).

70. See *id.*

71. 112 F.3d 910 (8th Cir.), cert. denied, Office of President v. Office of Indep. Counsel, 521 U.S. 1105 (1997).

72. 28 U.S.C. § 592 (1994). An investigation pursuant to this statute shall be made of such matters as the "Attorney General considers appropriate in order to make a determination . . . on whether further investigation is warranted, with respect to each potential violation, or allegation of a violation, of criminal law." *Id.* § 592 (a)(1). The Independent Counsel statute expired on June 30, 1999. See *Independent Counsel Law Expires Today: Statute Started During Watergate*, FLA. TIMES UNION, June 30, 1999, at A4 (reporting the reasons for enacting the Independent Counsel statute as well as the reasons for letting it lapse).

73. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 913 (quoting *In re Madison Guar. Sav. & Loan Ass'n*, Div. No. 94-1, Order at 1-2 (D.C. Cir. Sp. Div. Aug. 5, 1994)).

74. *Id.*

the Office of Independent Counsel delivered a grand jury subpoena duces tecum to the White House that required production of "all documents created during meetings attended by any attorney from the Office of Counsel to the President and Hillary Rodham Clinton."<sup>75</sup> The White House identified nine sets of notes in response to this subpoena, but ultimately refused to produce them, claiming, among other things, the attorney-client privilege.<sup>76</sup>

The district court addressed the White House's refusal, but found it unnecessary to decide the broad question presented by the Office of Independent Counsel of whether a federal governmental entity may assert the attorney-client privilege in response to a subpoena by a federal grand jury.<sup>77</sup> Rather, the court concluded that because Mrs. Clinton and the White House had a genuine and reasonable, albeit mistaken, belief that the conversations at issue were privileged, the attorney-client privilege indeed applied.<sup>78</sup> The Office of Independent Counsel appealed, and the Eighth Circuit granted an expedited review.<sup>79</sup>

On appeal, the Eighth Circuit refused to decide whether the government attorney-client privilege applies in civil litigation pitting the federal government against private parties.<sup>80</sup> Furthermore, the Eighth Circuit rejected the dissent's approach of recognizing a qualified government attorney-client privilege that would be subject to the *Nixon*<sup>81</sup> test for the executive privilege which balances the grand jury's need for the subpoenaed material against the White House's need for confidentiality.<sup>82</sup> The Eighth Circuit ultimately held that "the criminal context of the instant case, in which an entity of the federal government seeks to withhold information from a federal criminal investigation, presents a rather different issue"<sup>83</sup> and found that the government attorney-client privilege indeed evaporates during a criminal investigation.<sup>84</sup> *In re Grand Jury Subpoena Duces Tecum* was the first federal court of appeals case that actually decided whether a government attorney-client privilege exists in a federal grand jury setting.<sup>85</sup>

In holding that the attorney-client privilege does not apply, the court relied primarily on the nature of public service, stating that "the general duty of public service calls upon government employees and agencies to favor disclosure over concealment."<sup>86</sup> Additionally, the court found significant the fact that executive

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75. *Id.* (citation omitted).

76. *See id.*

77. *See id.* at 914.

78. *See id.*

79. *See id.*

80. *See id.* at 917-19.

81. United States v. Nixon, 418 U.S. 683, 712-13 (1974).

82. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 917-19.

83. *Id.* at 917-18.

84. *See id.*

85. *See In re Grand Jury Proceedings*, 5 F. Supp.2d 21, 31 (D.D.C.), *aff'd in part, rev'd in part sub nom. In re Lindsey*, 158 F.3d 1263 (D.C. Cir.) (per curiam), *cert. denied*, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.).

86. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920 (emphasis added).

branch employees, including attorneys, are under a statutory duty<sup>87</sup> to report criminal wrongdoing by other employees to the Attorney General.<sup>88</sup> Although the court acknowledged the White House's concern that "[a]n uncertain privilege . . . is little better than no privilege at all,"<sup>89</sup> the court pointed out that confidentiality will suffer *only* in those situations that involve criminal violations.<sup>90</sup> The court's practical advice concerning this possibility was that, "an official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney."<sup>91</sup>

### B. *In re Grand Jury Proceedings*

The D.C. District Court decided *In re Grand Jury Proceedings*<sup>92</sup> on May 27, 1998, just prior to *In re Lindsey*. Before *In re Grand Jury Proceedings*, the Special Division of the United States Court of Appeals for the District of Columbia expanded Kenneth Starr's prosecutorial jurisdiction and ordered him to conduct investigations concerning "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law."<sup>93</sup> The Office of Independent Counsel then moved to compel the testimony of Bruce Lindsey, Deputy White House Counsel and Assistant to the President.<sup>94</sup> Lindsey refused to answer certain questions, citing the government attorney-client privilege.<sup>95</sup> In seeking to compel Lindsey to testify, the Office of Independent Counsel urged the court to follow *In re Grand Jury Subpoena Duces Tecum* from the Eighth Circuit, by holding that the government attorney-client privilege disintegrates in a criminal context. The White House insisted that the majority's reasoning in *In re Grand Jury Subpoena Duces Tecum* was flawed and that the D.C. Circuit clearly recognizes an absolute government attorney-client privilege that applies equally to civil *and* criminal matters.<sup>96</sup>

The D.C. District Court partially agreed with the White House's view and confirmed the existence of an absolute government attorney-client privilege that

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87. See 28 U.S.C. § 535(b) (1994).

88. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920.

89. *Id.* at 921.

90. See *id.*

91. *Id.*

92. 5 F. Supp.2d 21 (D.D.C.), *aff'd in part, rev'd in part sub nom. In re Lindsey*, 158 F.3d 1263 (D.C. Cir.) (per curiam), *cert. denied*, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.).

93. *In re Lindsey*, 158 F.3d at 1267 (citation omitted).

94. See *In re Grand Jury Proceedings*, 5 F. Supp.2d at 24.

95. See *id.*

96. See *id.* at 31-32. The Attorney General filed an amicus brief in which she asked the court to recognize a qualified government attorney-client privilege that would "balance the demands of criminal law enforcement against the asserted need for confidentiality." *Id.* at 32 (quoting Brief Amicus Curiae for the United States, Acting Through the Attorney General at 7-8).

applies to Freedom of Information Act cases and other civil cases in which government attorneys represent government agencies or employees against private litigants in matters encompassing official government conduct.<sup>97</sup> The court reasoned that the “President’s need for confidential legal advice from the White House Counsel’s Office . . . [is] as legitimate as his need for confidential political advice from his top advisers.”<sup>98</sup> The court then held that this “compelling need supports recognition of a governmental attorney-client privilege even in the context of a federal grand jury subpoena.”<sup>99</sup>

Although this initial holding clearly contradicts the decision of the Eighth Circuit in *In re Grand Jury Subpoena Duces Tecum*, the court illustrated its unwillingness to recognize an absolute government attorney-client privilege.<sup>100</sup> The court agreed with the Eighth Circuit that the criminal/civil distinction is significant and that “[m]ore particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another.”<sup>101</sup> Finally, the court held that in the context of a grand jury investigation, where one government agency requires information from another to determine whether a crime has been committed, the government attorney-client privilege must be qualified “in order to balance the needs of the criminal justice system against the government agency’s need for confidential legal advice.”<sup>102</sup> This is essentially the same test proposed by the dissent in *In re Grand Jury Subpoena Duces Tecum*.<sup>103</sup>

To accomplish this balancing test, the court established that the government attorney-client privilege dissipates if the subpoena proponent can show “first, that each discrete group of the subpoenaed materials (or testimony) likely contains important evidence; and second that this evidence is not available with due diligence elsewhere.”<sup>104</sup> Upon application of this test, the court found that the Office of Independent Counsel’s submissions<sup>105</sup> detailing its need for the conversations between Lindsey and President Clinton were likely to elicit evidence that was important and relevant to the grand jury’s investigation and

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97. See *id.* at 32.

98. *Id.*

99. *Id.*

100. See *id.*

101. *Id.* (quoting *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 916 (8th Cir. 1997)).

102. *In re Grand Jury Proceedings*, 5 F. Supp.2d at 32-33.

103. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 935 (Kopf, J., dissenting), (“A careful balancing of the interests of the White House and the IC [is required] to preserve and protect the public interest that both governmental entities seek to promote.”).

104. *In re Grand Jury Proceedings*, 5 F. Supp.2d at 37-38 (quoting *In re Sealed Case*, 121 F.3d 729, 754 (D.C. Cir. 1997)).

105. The details of the submissions cannot be revealed because the submissions were viewed in camera and involve matters subject to Federal Rule of Criminal Procedure 6(e)(2). See *In re Grand Jury Proceedings*, 5 F. Supp.2d at 38.

were not available with due diligence elsewhere.<sup>106</sup> Therefore, the District Court granted the Office of Independent Counsel's motion to compel the testimony of Bruce Lindsey.<sup>107</sup>

### C. *In re Lindsey*

*In re Lindsey*, decided by the D.C. Circuit on July 27, 1998, commenced when the Office of President appealed the D.C. District Court's compulsion of Bruce Lindsey's testimony.<sup>108</sup> In response, the Office of Independent Counsel immediately petitioned the Supreme Court for review of the district court's decision, hoping to prevent a future delay resulting from a possible appeal from the D.C. Circuit Court. The Supreme Court, however, denied certiorari from the district court and indicated its expectation that the D.C. Circuit Court would proceed expeditiously to decide this case.<sup>109</sup>

After exploring the foundation for the attorney-client privilege and tracking the evolution of the government attorney-client privilege, the D.C. Circuit Court concluded that the "issue whether the government attorney-client privilege could be invoked [in response to a grand jury subpoena] is therefore ripe for decision."<sup>110</sup> In deciding this issue of first impression for the D.C. Circuit, the court held that "[w]hen government attorneys learn, through communications with their clients, of information related to criminal misconduct, they may not rely on the government attorney-client privilege to shield such information from disclosure to a grand jury."<sup>111</sup>

In route to its holding, the court discussed numerous policy considerations. The court relied heavily on the basic duties of government attorneys and officials when defining the contours of the government attorney-client privilege in the context of a criminal investigation:

When an executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty, and tradition dictate that the attorney shall provide that evidence. With respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far different position from members of the private bar. Their *duty* is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure.<sup>112</sup>

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106. See *id.*

107. See *id.* at 39.

108. See *In re Lindsey*, 158 F.3d 1263, 1267 (D.C. Cir.) (per curiam), cert. denied, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.).

109. See *Office of President*, 119 S. Ct. at 466.

110. *In re Lindsey*, 158 F.3d at 1271.

111. *Id.* at 1278.

112. *Id.* at 1272 (emphasis added).

Furthermore, borrowing from Judge Weinstein,<sup>113</sup> the court stated, “If there is wrongdoing in the government, it must be exposed . . . . [The government attorney’s] *duty* to the people, the law and his own conscience requires disclosure and prosecution.”<sup>114</sup> The court then complimented these governmental duties with the public’s interest in exposing illegality among its elected and appointed officials.<sup>115</sup> “Openness in government has always been thought crucial to ensuring that the people remain in control of their government.”<sup>116</sup>

As a supplement to these rudimentary duties, the court looked to several provisions in the U.S. Constitution involving oaths in order to formulate the confines of the government attorney-client privilege. First, the President and all members of the executive branch have a constitutional responsibility to “take Care that the Laws be faithfully executed.”<sup>117</sup> Furthermore, the President swears that he “will faithfully execute the Office of President of the United States, and will to the best of [his] [a]bility, preserve, protect and defend the Constitution of the United States.”<sup>118</sup> Lastly, each officer of the executive branch is bound by oath or affirmation to uphold the U.S. Constitution.<sup>119</sup> Although Judge Tatel pointed out in his dissent that every attorney must take an oath to uphold the U.S. Constitution in order to enter the bar of any court, the majority responded that a government attorney must take an additional oath to enter into government service and stated, “[T]hat in itself shows the separate meaning of the government attorney’s oath.”<sup>120</sup>

Additionally, the court noted that the executive branch adheres to the precepts of 28 U.S.C. section 535(b), which provides that “[a]ny information . . . received in a department or agency of the executive branch of the Government relating to violations of title 18 [the federal criminal code] involving Government officers and employees shall be expeditiously reported to the Attorney General.”<sup>121</sup> The court concluded that this provision suggests that government attorneys and officials have a duty to reveal evidence of possible commissions of federal crimes.<sup>122</sup>

After evaluating these policy concerns, the majority concluded that the government attorney-client privilege dissolves in the context of a criminal investigation and is therefore qualified. The dissent proposed some problems

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113. The Hon. Jack B. Weinstein is a Senior Judge for the United States District Court for the Eastern District of New York.

114. *In re Lindsey*, 158 F.3d at 1273 (emphasis added) (quoting Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155, 160 (1966)).

115. *See id.* at 1266.

116. *Id.* at 1274 (quoting *In re Sealed Case*, 121 F.3d 729, 749 (D.C. Cir 1997)).

117. U.S. CONST. art. II, § 1, cl. 8.

118. *Id.*

119. *See id.* art. VI, cl. 3.

120. *In re Lindsey*, 158 F.3d at 1273 n.3.

121. *Id.* at 1274 (quoting 28 U.S.C. § 535(b) (1994)).

122. *See id.*

with this holding, particularly that government officials will avoid confiding in government attorneys because they will never know at the time of disclosure whether the information they share, no matter how innocent it appears, may some day become pertinent to possible criminal violations.<sup>123</sup> Therefore, the dissent predicted that government officials will shift their trust on all but the most routine legal matters from White House counsel to private counsel.<sup>124</sup> The majority conceded that this qualified application of the government attorney-client privilege may indeed "chill some communications between government officials and government lawyers."<sup>125</sup> However, the majority ultimately concluded that government attorneys and officials will still enjoy the benefit of fully confidential communications between them unless the communications reveal information about possible criminal wrongdoing.<sup>126</sup> Moreover, the majority pointed out that nothing prevents government officials who seek totally confidential communications from seeking a private attorney.<sup>127</sup>

In response to the D.C. Circuit Court's holding, the Office of President filed a petition for certiorari; however, the Supreme Court denied certiorari.<sup>128</sup> Justice Stevens, while respecting the denial of certiorari, stated, "I believe that this Court, not the Court of Appeals, should establish controlling legal principle in this disputed matter of law, of importance to our Nation's governance."<sup>129</sup>

### III. THE AFTERMATH OF *IN RE LINDSEY*

Commentators have mixed reactions to *In re Lindsey*. Proponents of *In re Lindsey* have hailed the outcome because they believe that government attorneys and officials should answer directly to the American public.<sup>130</sup> The opponents of *In re Lindsey* have criticized it, citing detrimental consequences, such as "chilling effects," outsourcing of governmental legal work, revelation of military, diplomatic, or sensitive national security secrets, and slippery slope concerns.<sup>131</sup> Some critics have been more extreme with their remarks, stating that "this is a

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123. See *id.* at 1284 (Tatel, J., dissenting) (citation omitted).

124. See *id.* (Tatel, J., dissenting).

125. *Id.* at 1276.

126. See *id.*

127. See *id.*

128. *Office of President v. Office of Indep. Counsel*, 119 S. Ct. 466 (1998) (mem.).

129. *Id.* (Stevens, J., respecting denial of certiorari).

130. See, e.g., Bob Barr, *Barr Hails Clinton Attorney-Client Decision "Government Assets Not for Private Use"* (visited Nov. 1, 1998) <[http://www.house.gov/barr/p\\_starr3.htm](http://www.house.gov/barr/p_starr3.htm)>.

131. See Harvey Berkman, *Lindsey Ruling Impact: Outsourcing*, NAT'L L.J., Aug. 10, 1998, at A12; Marcia Coyle, *In the 8th Circuit-Privilege Ruling Could Touch All Government Attorneys-Whitewater Case Withholds Right That Corporate Clients Have Long Enjoyed*, NAT'L L.J., May 19, 1997, at A1; Marcus, *supra* note 11, at A1; Walter Pincus, *Past Attorney-Client Issue Resonates White House Lawyers Invoked Privilege in Iran-Contra Investigation*, WASH. POST, June 7, 1997, at A3.

mess that needs fixing.”<sup>132</sup> Although the Supreme Court denied certiorari, the potential repercussions this decision may have on government attorneys and officials is still unsettled. Therefore, these consequences would benefit from further analysis.

Supporters of a qualified government attorney-client privilege rely mostly on the nature of government employment as their arsenal. Congressman and former U.S. Attorney Bob Barr commented, “Taxpayer-funded government attorneys do not work for individuals under investigation for private conduct. They work for, and serve, the taxpaying citizens of this country.”<sup>133</sup> Furthermore, recognizing an absolute privilege for attorney-client communications in the government context would “compromise[] . . . the important public policy of openness in government affairs.”<sup>134</sup> While the majority of the judicial community appears to agree with the basic rationale that the public policy of open government outweighs the public policy of confidential communications involving a possible criminal violation by a government official, vehement opposition exists in the legal community. This opposition falls into these basic categories: “chilling effects” on communications between government attorneys and officials, outsourcing burdens, omission of protection for military, diplomatic, or sensitive national security secrets, and slippery slope concerns.

#### A. “Chilling Effects”

Opponents of the qualified government attorney-client privilege are primarily concerned with the “chilling effects” this ruling may have on communications between government attorneys and officials. Commentators, expanding upon Judge Tatel’s dissent in *In re Lindsey*,<sup>135</sup> have responded that the “chilling effects” this holding may induce are in direct conflict with the primary purpose of the attorney-client privilege: promoting full and frank communications.<sup>136</sup> White House counsel Charles F.C. Ruff, in response to the Supreme Court’s denial of certiorari in *In re Lindsey*, pronounced that “[w]e continue to believe that the attorney-client privilege should protect conversations between Government officials and Government attorneys. The American people benefit

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132. *Fix-up Time*, NAT’L L.J., Aug. 10, 1998, at A20.

133. Barr, *supra* note 130; see also *Appendix to the Hearings of the Select Committee on Presidential Campaign Activities*, reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY 105 (6th ed. 1995) (“It is the people who not only pay the Government lawyer’s salary but who are supposed to be the beneficiaries of his legal work and his true client.”).

134. Lory A. Barsdate, Note, *Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725, 1744 (1988).

135. Judge Tatel forecasted that the ruling essentially would deter government clients from confiding in government attorneys. See *In re Lindsey*, 158 F.3d 1263, 1284 (D.C. Cir.) (Tatel, J., dissenting), cert. denied, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.).

136. See Marcus, *supra* note 11, at A1.

from decisions made by Government officials . . . on the basis of full and frank information and discussion.”<sup>137</sup>

“Chilling effects” on full and frank communications will inevitably occur because potential criminal wrongdoing is not always conspicuous at the time of disclosure; “[f]ear of a future investigation, even a meritless one, will make government officials practice a better-safe-than-sorry approach”<sup>138</sup> and err on the side of nondisclosure. The *In re Lindsey* majority’s rebuttal states that government officials will still enjoy the benefit of fully confidential communications with their attorneys, *unless* the communications expose information relating to possible criminal wrongdoing.<sup>139</sup> While this lessens the concern about “chilling effects,” the practical effect is that government officials will more likely seek private counsel if they even remotely suspect that a criminal investigation may ensue.

### B. Outsourcing of Governmental Legal Work

The practice of government officials seeking private counsel, known as outsourcing,<sup>140</sup> is an additional concern of those opposed to the qualified government attorney-client privilege. However, attorneys have already been advising government attorneys and officials to retain a private attorney. For example, G. Jerry Shaw, a partner in a D.C. law firm that represents federal employees, has confirmed that “[a]ttorneys who work for the government have *always* known, and it has *always* been taught to them, that their client is the government or agency and not the individual.”<sup>141</sup> However, even when government officials heed this advice and hire a private attorney, they incur a tremendous monetary burden.<sup>142</sup> Furthermore, it essentially deprives the government of critical information because government officials will be less likely to give information freely to government attorneys based on the advice of their private attorneys.<sup>143</sup>

In an effort to abate this burden on government officials, an insurance policy, which has been “selling like hotcakes,” has recently been made available and provides \$1 million in liability coverage for suits arising out of government officials’ jobs and pays up to \$100,000 for legal services.<sup>144</sup> Furthermore, Congress has proposed a bill that reimburses government supervisors and management officials for up to fifty percent of the costs incurred by such

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137. Stephen Labaton, *Administration Loses Two Legal Battles Against Starr*, N.Y. TIMES, Nov. 10, 1998, at A19.

138. Toporek, *supra* note 69, at 2436-37.

139. See *In re Lindsey*, 158 F.3d at 1276.

140. See generally Patricia M. Wald, *Looking Forward to the Next Millennium: Social Previews to Legal Change*, 70 TEMP. L. REV. 1085, 1096 (1997).

141. Berkman, *supra* note 131, at A12 (emphasis added).

142. See Toporek, *supra* note 69, at 2438.

143. See *id.*

144. See Berkman, *supra* note 131, at A12.

employees for this professional liability insurance.<sup>145</sup> Although the availability of liability insurance and the reimbursement of premiums will not prevent outsourcing of legal work to the private sector, it does curb the monetary burden for government officials, and therefore weakens the opposition's argument.

### C. Omission of Protection for Military, Diplomatic, or Sensitive National Security Secrets

Seeking a private attorney may involve a more potent and clandestine concern than mere "chilling effects" and outsourcing burdens: the possibility of revealing military, diplomatic, or sensitive national security secrets. This is the third concern opponents of the qualified government attorney-client privilege raise. This possibility is particularly worrisome in a situation involving a high-ranking government official, such as the President, Vice President, or a cabinet member, because the communications exchanged often involve matters that are of vital importance to the security and prosperity of the nation.<sup>146</sup> Even supporters of a qualified government attorney-client privilege shun its applicability to national security matters. For example, C. Boyden Gray, White House counsel during the Bush administration, believes that an absolute government attorney-client privilege should extend to communications involving national security matters, such as Iran-Contra,<sup>147</sup> that may involve possible violations of law.<sup>148</sup> C. Boyden Gray's rationale for this absolute protection is that government officials will not have to acquire two sets of attorneys, one government and one private, in order to clear a top secret.<sup>149</sup> Second, C. Boyden Gray believes that absolute protection will eliminate the inherent riskiness in relying on outside attorneys because of the sensitivity, and consequent exposition to a non-government attorney, of the top-secret information involved.<sup>150</sup> Although Gray supports this view, he does not believe that government attorneys should be representing government officials who face possible involvement in

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145. See H.R. 4278, 104th Cong. § 636 (1996). This liability insurance covers any tortious act, error, or omission while in the performance of such individual's official duties, as well as the ensuing litigation and settlement expenses. *See id.*

146. See *United States: Government Lawyers Can't Invoke Privilege when Called to Testify Before Grand Jury*, 1998 U.S.L.W.D. (BNA), Aug. 3, 1998, at D3; see also Stanley Brand, *A Blow Is Struck Against Attorney-Client Privilege for Government Lawyers in the Whitewater Independent Counsel Case*, 44-JUN FED. LAW. 9 (1997) ("[Outsourcing] may spark more government officials to seek advice from private lawyers in *sensitive ethics cases* or *internal agency investigations* that have the potential to turn into criminal probes.") (emphasis added).

147. In 1986, two secret U.S. Government operations were publicly exposed in which the United States sold arms to Iran in exchange for American hostages in contravention of stated U.S. policy and in possible violation of arms-export controls. *See* 1 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 1-2 (1993).

148. *See* Pincus, *supra* note 131, at A3.

149. *See id.*

150. *See* Coyle, *supra* note 131, at A1.

criminal matters, even if the information involves issues of national security.<sup>151</sup>

#### *D. Slippery Slope Concerns*

Less worrisome than the revelation of national security matters is the slippery slope problem. Even before the D.C. Circuit decided *In re Lindsey*, commentators cautioned to “[b]e prepared to see [the Eighth Circuit’s ruling in *In re Grand Jury Subpoena Duces Tecum*] flower because of the number and breadth of government investigations that become criminal. And be prepared for the extension of this decision . . . from criminal to civil proceedings.”<sup>152</sup> Furthermore, the increasing number of investigations conducted by the Office of Independent Counsel also causes concern for an over-inclusive extension of this ruling.<sup>153</sup> Although *In re Lindsey* will clearly place restrictions on the relationship between government attorneys and officials, the effects of these restrictions are yet to be known.

*In re Lindsey* will indeed have repercussions for government attorneys and officials. However, the nature of public service validates most of the effects this decision will create. While the “chilling effects,” outsourcing burdens, and slippery slope concerns can be minimized, the possibility of revealing military, diplomatic, or sensitive national security secrets based on this qualified government attorney-client privilege must be thwarted.

### IV. PROPOSED ALTERATIONS TO *IN RE LINDSEY*

Many suggestions have been made to lessen the impact that *In re Lindsey* may have on government attorneys and officials. Most of these proposed solutions incorporate balancing the need for confidentiality against the need for evidence in criminal cases. However, the Supreme Court has explicitly rejected this concept of applying balancing tests to the attorney-client privilege.<sup>154</sup> Furthermore, using a balancing test will likely compromise the public’s interest in unmasking illegality among its elected and appointed officials. In light of this concern, there still remains a void in the *In re Lindsey* decision that must be addressed before hindsight regrets its omission from the government attorney-client privilege. This void can be filled by establishing an exception to the government attorney-client privilege that applies when the information disclosed deals with military, diplomatic, or sensitive national security secrets. This can be accomplished by using an in camera inspection.

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151. See Pincus, *supra* note 131, at A3.

152. Coyle, *supra* note 131, at A1; see also Brand, *supra* note 146, at 9 (“The court of appeals decision will certainly encourage litigants to seek to expand the rationale to civil cases.”).

153. See Coyle, *supra* note 131, at A1 (“Given the proliferation of independent counsel . . . similar requests by other independent counsel for attorney-client materials will be made against numerous government agencies.”).

154. See *Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2087 (1998).

### A. Balancing Test

One example of a balancing test, borrowed from Judge Kopf's dissent<sup>155</sup> in *In re Grand Jury Subpoena Duces Tecum*, is to require a showing of need and an in camera inspection by a federal judge of the subpoenaed materials in order to determine relevance and admissibility.<sup>156</sup> The benefit of using this approach is that every privileged communication subpoenaed in a criminal investigation will not be automatically disclosed.<sup>157</sup> Instead, the "judge would carefully weigh the importance of the communication to the criminal investigation against the importance of confidentiality to encourage full and frank communications with government attorneys."<sup>158</sup>

Although this balancing test appears "fair," it must ultimately fail. The first reason is the context in which the government attorney-client privilege initially will be claimed—the grand jury. The grand jury, a constitutional body established in the Bill of Rights,<sup>159</sup> "belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people."<sup>160</sup> Allowing a government attorney to withhold relevant criminal evidence in some instances would essentially disparage the grand jury's function as a buffer between the government and the people. Furthermore, not only does a grand jury have broad investigatory powers,<sup>161</sup> but government attorneys also have a duty to provide testimony to the grand jury.<sup>162</sup>

Second, the Supreme Court has criticized the practice of applying a balancing test to the attorney-client privilege.<sup>163</sup> This criticism has resulted because of the

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155. Judge Kopf would require the special prosecutor to make an initial threshold showing before the district court that the documents are specifically needed, relevant, and admissible. Furthermore, assuming the prosecutor met this showing, Judge Kopf would require the documents to be examined in chambers in order to determine whether in fact the documents are relevant and admissible. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 926-27 (8th Cir.) (Kopf, J., dissenting), cert. denied, *Office of President v. Office of Indep. Counsel*, 521 U.S. 1105 (1997); see also *In re Grand Jury Proceedings*, 5 F. Supp.2d 21, 32 (D.D.C.), aff'd in part, rev'd in part sub nom. *In re Lindsey*, 158 F.3d 1263 (D.C. Cir.) (per curiam), cert. denied, *Office of President v. Office of Indep. Counsel*, 119 S. Ct. 466 (1998) (mem.) (stating that the government attorney-client privilege must be qualified "in order to balance the needs of the criminal justice system against the government agency's need for confidential legal advice").

156. See Toporek, *supra* note 69, at 2439.

157. See *id.* at 2440.

158. *Id.*

159. See U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .").

160. *In re Lindsey*, 158 F.3d at 1271.

161. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 918. Furthermore, "[t]he principle that the public is entitled to 'every man's evidence' is 'particularly applicable to grand jury proceedings.'" *Id.* at 919 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)).

162. See Marcus, *supra* note 11, at A1.

163. See *In re Lindsey*, 158 F.3d at 1268.

uncertainty a client may have at the time of disclosure as to whether the information will later become relevant to a civil or criminal matter, let alone whether it will be of substantial importance.<sup>164</sup> Balancing the importance of the information against client interests introduces substantial uncertainty into the privilege's application; therefore, the use of a balancing test is not applicable when defining the contours of the attorney-client privilege.<sup>165</sup>

### B. *In Camera Inspection*

Although good grounds exist for not employing a balancing test, the issue of disclosing military, diplomatic, or sensitive national security secrets, which *In re Lindsey* left open, is still not resolved. The possibility of disclosure, which Part III of this Note addresses, is a realistic concern that the Supreme Court addressed *United States v. Nixon*.<sup>166</sup>

In determining whether President Nixon must disclose audiotapes concerning the break-in at Watergate, the Court held that the assertion of the executive privilege must ultimately yield to the specific need for evidence in a criminal investigation, unless the investigation encompasses military, diplomatic, or sensitive national security secrets.<sup>167</sup> The basis of this sensitive information exception is rooted in the nature of the President's work. "The President, both as Commander-in-Chief and as the nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world."<sup>168</sup> Furthermore, "[i]t may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."<sup>169</sup>

Although the government attorney-client privilege does not necessarily involve information exchanged between the President and his advisors, it does involve information exchanged between government officials and government attorneys. High-ranking government officials, such as the Secretary of Defense,

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164. See *Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2087 (1998).

165. See *id.*; see also *Jaffee v. Redmond*, 518 U.S. 1 (1996). The Court in *Jaffee* stated if the purpose of the privilege is to be served, the participants in the confidential conversation must be able to predict with some degree of certainty whether particular discussions will be protected" because "an uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

*Id.* at 17-18. See also *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) ("[T]he attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected.").

166. 418 U.S. 683 (1974).

167. See *id.* at 706.

168. *Id.* at 710 (quoting *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)).

169. *Id.* at 711 (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)).

Joint Chiefs of Staff, Secretary of State, or National Security Advisor, often have unrestricted access to top-secret information concerning the military, foreign affairs, or national security. Therefore, it is reasonable that if such officials are called upon to testify in a criminal investigation, they should also be extended the protection that the President is afforded under the executive privilege.<sup>170</sup>

Furthermore, the *In re Lindsey* court affirmatively borrowed the concept of evaporating the attorney-client privilege in a criminal context from the Supreme Court's formulation of the executive privilege in *United States v. Nixon*,<sup>171</sup> but neglected, without apparent explanation, to adopt the other important facet of the executive privilege—absolute protection for military, diplomatic, and sensitive national security secrets. The *In re Lindsey* court gave no reason why it only adopted one-half of the executive privilege formula. Whether by oversight or intent, divulgence of secret matters is a realistic possibility that the court in *In re Lindsey* should have discussed.

This concept of extending absolute protection to communications involving secret matters is not distinctive to the executive privilege. "In certain circumstances, the Government may invoke its governmental privilege with regard to the discovery of informants and state and military secrets."<sup>172</sup> Other courts have also acknowledged that disclosing secrecy matters could be harmful to the government and consequently have devised methods to prevent this from occurring.<sup>173</sup>

In order to extend this needed protection to matters concerning military, diplomatic, or sensitive national security secrets, a method should be utilized which will not compromise the public's right to unveil wrongdoing among government officials. Several courts have held that, given the strong competing interests to be balanced, the government attorney-client privilege should require examination of the subpoenaed documents *in camera*.<sup>174</sup> "The court must give . . . consideration to an appropriate method by that which is legitimately privileged, such as . . . intragovernmental policy discussions, [which] may be shielded while the relevant factual data is disclosed. In this connection, the court may want to use the *in camera* examination device."<sup>175</sup> Therefore, whenever information

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170. C. Boyden Gray, White House counsel during the Bush administration, believes that an absolute government attorney-client privilege should be extended to communications that involve national security matters. See Pincus, *supra* note 131, at A3.

171. See *In re Lindsey*, 158 F.3d at 1266.

172. MERTENS, *supra* note 67, at § 58A.34 (citing *E.W. Bliss Co. v. United States*, 203 F. Supp. 175 (N.D. Ohio 1961)).

173. See, e.g., *United States v. Reynolds*, 345 U.S. 1, 6-7 (1953) (holding that there is a governmental privilege for state and military secrets); *People ex rel. Dep't of Pub. Works v. Glen Arms Estate, Inc.*, 41 Cal. Rptr. 303 (Cal. Ct. App. 1964) (applying an *in camera* inspection to state secrets and official communications).

174. See, e.g., *Scott Paper v. United States*, 943 F. Supp. 489, 498 n.8 (E.D. Pa.), *aff'd*, 943 F. Supp. 501 (E.D. Pa. 1996).

175. *Id.* (quoting *United States v. O'Neill*, 619 F.2d 222, 230 (3d. Cir. 1980)); see also *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 582 (E.D.N.Y. 1980) ("Given the clash of strong

potentially contains military, diplomatic, or sensitive national security secrets, the judge would determine what exactly should be disclosed, such as basic facts, without compromising the sensitivity of the information, but nevertheless satiating the public's right to unveil illegality among government officials.

Using a balancing test to eradicate the negative effects of *In re Lindsey* may not be a viable alternative for two primary reasons: the specialized function of the grand jury and the criticism by the Supreme Court concerning application of balancing tests to the attorney-client privilege. However, by holding that the government attorney-client privilege evaporates in the context of a criminal investigation, the *In re Lindsey* court left open a possibility that has been criticized before—revelation of diplomatic, military, or sensitive national security secrets.<sup>176</sup> The possibility of revealing such information needs to be addressed before hindsight regrets its omission from the government attorney-client privilege. In order to accomplish this, whenever the government attorney-client privilege is claimed in a response to a criminal investigation involving diplomatic, military, or sensitive national security secrets, the courts should create an exception to the government attorney-client privilege that requires judges to conduct an in camera review. An in camera review will ensure that the sensitivity of the information is not compromised because judges will censor what should be disclosed.

## CONCLUSION

Regardless of the proposed alterations to the government attorney-client privilege, there will be consequences to the relationship between government attorneys and officials. In order to alleviate these ensuing changes, a few simple procedures should be followed. First, government attorneys should establish a plan for identifying and reporting to senior attorneys any legal matters that involve a criminal inquiry.<sup>177</sup> Those matters, and the work of government attorneys in connection with them, can then be monitored with the understanding that the government attorney-client privilege may not be available.<sup>178</sup> Second, government attorneys should warn government officials from the outset that they represent the governmental entity, not the individual official; therefore, government attorneys can steer individuals toward private counsel if needed.<sup>179</sup> If government attorneys follow this approach, it may sometimes make it more difficult to obtain information from government officials; however, it should then minimize the risk that a government attorney could be criticized for not putting an official on notice that his discussion with the government attorney was not

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competing interests, the official information privileged usually requires examination of the documents in camera.”).

176. See *supra* text accompanying notes 168-75.

177. See Lance Cole, *The Government-Client Privilege After Office of the President v. Office of the Independent Counsel*, 22 J. LEGAL PROF. 15, 26 (1998).

178. See *id.*

179. See *id.* at 28.

privileged.<sup>180</sup> As far as government officials are concerned, they should heed the advice of the Eighth Circuit, “An official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney.”<sup>181</sup> Following these simple recommendations will not entirely eradicate the proposed effects of the qualified government attorney-client privilege, but it will ease the transition to limited protection for communications between government attorneys and officials that encompass criminal wrongdoing.

In conclusion, although the government attorney-client privilege contains an exception, dissolution of the privilege in the face of a criminal investigation, that the attorney-client privilege does not contain, the differences between the two privileges are ultimately dispositive. The bottom line is that taxpayer-funded government attorneys and officials work for, and serve, the taxpaying citizens of this country. Therefore, a qualified government attorney-client privilege in a criminal context, which *In re Lindsey* establishes, is warranted because of the public’s right to uncover illegality among its elected and appointed government officials.

Although there has been much opposition to *In re Lindsey*, much of the criticism, such as “chilling effects” and outsourcing burdens, can be tempered. The major solutions proposed to eradicate these potential effects, such as balancing tests that weigh the grand jury’s need for the evidence against the need to protect full communications between government attorneys and officials, are equally problematic. However, this does not resolve the issue. The *In re Lindsey* court notably left out an important possibility in its construction of the qualified government attorney-client privilege—revelation of military, diplomatic, or sensitive national security secrets. This oversight has left a void in the *In re Lindsey* decision that needs to be filled. To fill this void, courts should create an exception to the government attorney-client privilege that will protect military, diplomatic, and sensitive national security secrets by requiring judges to employ an *in camera* inspection. An *in camera* inspection will safeguard the sensitivity of such information because judges can censor it before disclosure. Unfortunately, because Monica Lewinsky is not a military, diplomatic, or sensitive national security secret, even this formulation of the government attorney-client privilege would not have prevented Bruce Lindsey from testifying about the “inappropriate” relationship between President Clinton and Monica Lewinsky had President Clinton not admitted to it.

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180. See *id.* at 28-29.

181. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir.), cert. denied, Office of President v. Office of Indep. Counsel, 521 U.S. 1105 (1997). See also *In re Lindsey*, 158 F.3d 1263, 1276 (D.C. Cir.) (per curiam), cert. denied, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.) (“[N]othing prevents government officials who seek completely confidential communications with attorneys from consulting personal counsel.”).



# **ROCKIN' DOWN THE HIGHWAY: FORGING A PATH FOR THE LAWFUL USE OF MP3 DIGITAL MUSIC FILES**

MARY JANE FRISBY\*

## **ONLY THE BEGINNING: AN INTRODUCTION**

Since the late 1990s there has been an uproar, widely reported in the popular media, over the widespread copying and transmission of pre-recorded music onto high-quality computer files known as MP3 files. With angry representatives of the music industry on one side and defiant copyright infringers on the other, the law that pertains to digital music has been misunderstood and sometimes ignored. The purpose of this Note is to provide some guidance to MP3 users on what is required for lawfully copying and transmitting MP3 music files by applying the current law to digital recordings and analyzing how recent acts of Congress have further sharpened the issues surrounding the use of MP3 files on the Internet. An underlying theme throughout the paper will be the continuing importance of preserving opportunities for the fair use of digital music.

This Note is organized into eight Parts. Part I briefly introduces MP3 files, including how they are made, acquired, and played. The controversy in both the music industry and in the popular media is also described. Part II provides a short primer on the music industry and outlines the relationship between the industry's two principal players, music publishers and record companies.

Part III provides a somewhat longer primer on the complicated law of copyrights for music recordings. Even attorneys who have a basic familiarity with the Copyright Act are frequently confused by the distinctions the Act makes between the rights that accompany musical works and those that accompany sound recordings; this distinction only grows more confusing as the law endeavors to enter the realm of digital audio recordings. This Part begins by attempting to sort out and explain the rights of the two principal players. Next is a simplified description of the complex system of voluntary and compulsory licenses used by the music publishing industry, followed by a brief definition of infringement. Finally, an introduction to the doctrine of fair use is provided.

Part IV demonstrates how common uses of MP3 files, particularly the transmission of MP3 files over the Internet, fit into the framework of copyrights and licensing. More specifically, the licensing provisions of the Digital Performance Rights in Sound Recordings Act of 1995 is used to demonstrate the licensing framework in which non-infringing transmissions of MP3 files can occur. Part V turns to infringing uses of MP3 files and assesses the potential liabilities of various entities in the online world, including the owners of web sites, Internet Service Providers, and home users. The difficulty of using traditional enforcement methods in the online environment is emphasized. Part VI briefly recounts how the music industry is turning to technology to prevent future copyright infringement rather than focusing on finding remedies for past infringements.

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Part VII introduces, somewhat skeptically, the latest salvo in the war to prevent the piracy of digital sound recordings: the Digital Millennium Copyright Act (DMCA), which was enacted in November 1998 and will become effective in October 2000. The basic provisions of the DMCA relevant to MP3 users are described, including sections that shield Internet Service Providers in certain circumstances from liability for infringing web sites, the creation of an additional statutory license for certain transmissions of digital recordings, and how the circumvention of copyright protection devices has been criminalized. The DMCA also purports to accomplish these protections while still protecting traditional notions of fair use.

Part VIII assesses the impact of the DMCA on the fair use of MP3-formatted sound recordings. The dilemma faced by Congress is how to balance a locked-up "pay-per-use" Internet, which was envisioned by some as the likely future of the World Wide Web, with the need to protect fair use. A danger exists that fair use in such a system would require a narrow, regulated, status-based regime that would have to determine who would be "eligible" to make fair use of copyrighted works.

The conclusion contains the hope that during the time before the DMCA goes into effect Congress will formulate a policy able to amply protect the rights of copyright owners while still permitting individuals to make fair use of digital materials without undue regulation or a "locked up" Internet. There may be other ways to compensate copyright owners while preventing a pay-per-view Internet. In fact, the best solution may be for the recording industry to accept the MP3 format and begin to exploit it itself. The appendix contains a table outlining the respective licensing regimes of the two different types of copyright owners in sound recordings.

### I. A NEW SENSATION: INTRODUCING MP3 FILES

A powerful new computer file format for digitally storing music has swept through the online community, captured the attention of the popular culture, and in the process, raised the ire of many leaders in the recording industry.<sup>1</sup> This file format is being used to create super-compressed digital copies of pre-recorded works that have the same sound quality as tracks found on compact discs ("CDs"). These files are known as MP3 files.

MP3 stands for MPEG 1 layer 3, which is an abbreviation of "Motion Picture Experts Group Layer 3 Compression Format."<sup>2</sup> It is a file format for digitally storing music in computer files, which as a result are named with the extension

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1. See, e.g., *Blame It on Rio*, NEWSWEEK, Nov. 9, 1998, at 8; David Bowie, *Bowie Wants to Rock Music World with World Wide Web*, INDPLS. STAR, Jan. 24, 1999, at I3; Ron Harris, *Tech Advances May Reform Shopping for Music*, INDPLS. STAR, Dec. 12, 1998, at C1; John Pareles, *With a Click, a New Era of Music Dawns*, N.Y. TIMES, Nov. 15, 1998, at AR1.

2. See T. R. Reid, *Record Company Execs Infuriated by the Newest PC Buzzword: 'MP3'*, THE DAILY RECORD (Baltimore), May 19, 1998, at 2B, available in 1998 WL 9507824; *MP3 for Beginners* (visited July 28, 1999) <<http://www.mp3.com/faq/general.html>>.

“.mp3.” MP3 files have an advantage over the standard WAV<sup>3</sup> music files because the quality of sound they contain is near perfect, and since they are compressed, take up very little space—a ratio of twelve WAV files to one MP3 file.

MP3 files are easy to make. Provided one has a computer with a suitable CD-ROM drive, MP3 files can be made by transforming tracks from an ordinary CD into WAV files (a process called “ripping” that uses CD ripper software, such as WinDac32), and then using MP3 encoder software to compress the WAV files into MP3 files. Alternatively, MP3 files can be encoded directly from a CD with MP3 compressor software.<sup>4</sup> The process can also be reversed. MP3 files can be transferred into WAV files, or even written onto a regular audio CD.<sup>5</sup>

In addition to making MP3 files by ripping tracks from CDs, MP3 files can be acquired directly over the Internet. For instance MP3.com offers a complete catalog of MP3 music, organized both by song titles and artists and by genre and region.<sup>6</sup> Plenty of other MP3 files can be found posted on other web sites, including “renegade” sites with bootlegged music, legitimate sites such as MP3.com and e-music.com and those sponsored by recording artists or record companies. Some music has had its first release in the MP3 file format, including a recent album released online by Public Enemy and an electronic label, Atomic Pop.<sup>7</sup>

To play an MP3 file on a computer requires a simple player that can be downloaded as shareware (such as WinAmp) to uncompress files.<sup>8</sup> MP3s do not require a computer to play them, however. Recently, Diamond Multimedia Systems, Inc. has released a small portable MP3 player, named the Rio.<sup>9</sup> Creative has introduced an even smaller portable player called the Nomad.<sup>10</sup>

In a brief time, MP3 has become a household word and is among the top terms searched on the World Wide Web.<sup>11</sup> The magazine *Entertainment Weekly*

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3. WAV is “[t]he format for storing sound in files developed jointly by Microsoft and IBM. . . . WAV sound files . . . can be played by nearly all Windows applications that support sound.” <<http://webopedia.internet.com/TERM/W/WAV.html>>.

4. See *Making MP3s* (visited July 28, 1999) <<http://www.mp3.com/faq/making.html>>.

5. See *id.*

6. See *Find Music* (visited July 28, 1999) <<http://www.mp3.com/faq/findmusic.html>>.

7. See Zack Stentz, *Net Effect*, NEWSWEEK, May 14, 1999, at 24. Even a comic strip character—Doonesbury’s aging rock star Jimmy Thudpucker—released music on the web in a series of strips during the summer of 1999. See Garry Trudeau, *Doonesbury*, INDPLS. STAR, July 5, 1999, at E8.

8. See *MP3 Player Setup* (visited July 28, 1999) <<http://www.mp3.com/faq/gettingstarted.html>>.

9. See Harris, *supra* note 1, at C1.

10. See *Join the Happy Wanderers*, NEWSWEEK, July 26, 1999, at 16. An MP3 player is even available for cars from a British company called Empeg at [www.empeg.com](http://www.empeg.com). <<http://www.empeg.com>>.

11. “To the surprise of nearly everyone connected to the Web, MP3 has replaced sex as the most frequently searched term on the Internet, according to market researcher Searchterms.com.”

now devotes regular coverage of the MP3 world.<sup>12</sup> According to its enthusiasts, the MP3 format has become the dominant form of digital music file found on the Internet:

MP3 is an open standard, meaning no one organization controls it. On the Internet, open standards win and this is why even without any significant corporate backing, MP3 is already the de facto [music file format]. There are more MP3 listeners, software programs, and hardware devices than any other CD quality audio format in the world. Microsoft has also built MP3 support into Windows 98.<sup>13</sup>

Naturally, multiple legal ramifications accompany this success. The high-quality sound, the compressed format, and the ease and speed with which MP3 files can be reproduced and distributed around the globe via the Internet poses a significant threat to the copyright owners of songs and sound recordings. The Recording Industry Association of America (RIAA) has cracked down on web sites that post MP3 versions of copyrighted songs by getting temporary restraining orders.<sup>14</sup> But RIAA also recognizes that online distribution is the future of the business.<sup>15</sup> Nevertheless, the threat of infringement is growing. Until recently, the danger of computer piracy seemed confined to a relatively small niche of advanced computer users and web surfers. In the near future, however, creating and playing MP3 files will become as easy, and possibly as commonplace as the making of a cassette tape from a CD. An example of this technology reaching the everyday music listener is the recent public release of the Rio, a tiny three-ounce portable digital music player, by Diamond Multimedia Systems, Inc., a California-based electronics company.<sup>16</sup> Resembling a miniature palm-sized Sony Walkman, the Rio is able to store and play up to sixty minutes of digitally-recorded music.<sup>17</sup> Alarmed at the prospect of mass-market copying of music, RIAA asked the U.S. District Court for the Central District of California to enjoin Diamond from releasing the Rio.<sup>18</sup> Although a temporary

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Warren Cohen, *They Want Their MP3*, U.S. NEWS ONLINE, July 26, 1999 (visited Jan. 7, 2000) <<http://www.usnews.com/usnews/issue/990726/mp3.htm>>.

12. See, e.g., Chris Willman, *A New Format Lets Any Dorm-room Netnik Download and Duplicate Music*, ENTERTAINMENT WKLY., Nov. 27, 1998, at 92 (the magazine's first article on MP3). The magazine now routinely covers MP3 news in its Internet section. See, e.g., several mentions in the Nov. 5, 1999 issue at 89.

13. Michael Robertson, *Top 10 Things Everyone Should Know About MP3* (visited July 28, 1999) <<http://www.mp3.com/news/070.html>>.

14. See John F. Delaney & Adam Lichstein, *The Law of the Internet: A Summary of U.S. Internet Caselaw and Legal Developments*, 505 PLI/PAT 79, 104 (1998).

15. See Jason Chervokas, *New CD-Copying Trend Threatens Record Industry*, CHI. TRIB., Apr. 17, 1998, at 70, available in 1998 WL 2846958.

16. See Michael S. Mensik & Jeffrey C. Groulx, *From the Lightweight 'Rio' Flows Heavyweight Battle*, NAT'L L.J., Dec. 14, 1998, at B5.

17. See *id.*

18. See *id.*; Recording Indus. Ass'n of Am., Inc. v. Diamond Multimedia Sys. Inc., 29 F.

restraining order was granted, at the full hearing for a preliminary injunction, the court denied the relief the recording industry sought on the grounds that the Rio is a neutral recording and playback device, not a device for making downstream copies.<sup>19</sup> This interpretation was upheld by the Ninth Circuit in June 1999.<sup>20</sup> Although RIAA did not yet prevail against the Rio, this case will likely be one skirmish in a long battle between the recording industry and the consumer electronics industry over the future use of MP3 files.

It is important to recognize that the MP3 format is itself legally neutral. For instance, the use of MIDI technology to record music played on electronic instruments directly into a computer file is a method of creating original music as an MP3-formatted recording. Similarly, copyrighted music can be reproduced as an MP3 file by the copyright owner or with the owner's permission, and recordings in the public domain can also be MP3-formatted. This Note is concerned with the reproduction, performance, and distribution of MP3 files created from *copyrighted* works by *non-owners*. Before launching into the place of the MP3 storm in the context of our current copyright law system, broad summaries of both the music industry and of copyright law as it relates to music are needed to provide a framework for understanding the problem.

## II. ROCKIN' IN THE FREE WORLD: A PRIMER ON OWNERSHIP IN THE MUSIC INDUSTRY

The ownership of a piece of music and any accompanying lyrics (a "song" for our purposes) can be divided among a variety of personages. The songwriter (the "composer") is generally the original owner of the song.<sup>21</sup> As is frequently the case in today's popular music, the composer is also the artist who will eventually perform or record the song. Thus the owner of a song may simultaneously be its composer, lyricist, and artist. Composers ordinarily enter into a contract with a music publisher ("publisher") in which the composer licenses to the publisher his ownership of the song in exchange for a share of the song's revenues. The publisher's job is to market the song commercially, which includes contracting with record companies to record the song in exchange for royalties, a share of which is then passed on to the composer.<sup>22</sup> Because traditionally song composers were not themselves performing artists, publishers also contracted with selected artists who would perform and record the song. These days, however, the role of the traditional independent publisher has

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Supp.2d 624 (C.D. Calif. 1998), *aff'd*, 180 F.3d 1072 (9th Cir. 1999).

19. See *Recording Indus. Ass'n of Am., Inc.*, 29 F. Supp.2d at 632.

20. See *Recording Indus. Ass'n of Am., Inc. v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072, 1080 (9th Cir. 1999).

21. If the song is comprised of music written by one person and lyrics written by someone else (as in the famed collaborations of George and Ira Gershwin or, more recently, Elton John and Bernie Taupin), then ownership in the song may be divided between both authors jointly.

22. See DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 213-35 (1997) for a good summary of the role of music publishers.

diminished. Many composers are themselves the performers, and now often serve as their own publishers as well. Moreover, record companies now also have publishing divisions. For the sake of simplicity, I shall always refer to a song's owner as the "publisher." Still, it is important to keep in mind that in many contractual arrangements the "publisher" may actually be the composer, who may also be the artist.<sup>23</sup>

Publishers enter into contracts with record companies (the ever-elusive "record deal") for their songs. Although the terms of these contracts can vary widely, the standard agreement requires the record company to produce and manufacture a sound recording ("record") of the publisher's song(s).<sup>24</sup> The recording company gets to keep the bulk of the revenues from sales of the record while passing on a percentage to the publisher in the form of royalties. The artist who performs on the record will also be given either a royalty share or a flat stipend. Thus, when the publisher and artist are the same person, the publisher/artist contracts upon two bases for payment from the record company. The record company must also arrange for the distribution and marketing of the record (including advertising and soliciting radio play), and in some cases support the artist's promotional activities on behalf of the record (such as concerts and tours).<sup>25</sup> While in most agreements the publisher maintains ownership of the songs, the record company has complete ownership of the record itself.<sup>26</sup> Therefore, when discussing a particular recording, at least two sets of rights are generally involved: those of the owner of the song, and those of the owner of the recording of the song.

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23. A song in which the recording artist has an ownership interest is termed a "controlled composition," which entitles the artist to receive publisher's royalties as well as royalties for performing on the record. See *id.* at 221-30 for a detailed account of the complex negotiations that occur to set royalty rates in recording contracts for controlled compositions.

24. These are also known as phonographs. A "record" here is intended to be the same as what the Copyright Act refers to as "sound recordings" in section 101, including MP3 files and all the formats currently being manufactured by record companies, such as CDs/Enhanced CDs/minidisks, audio cassettes, Digital Audio Tapes (DATs), and LPs. See 17 U.S.C. § 101 (1994).

25. As this is a very simple example, complicating factors such as music videos (often paid for by the artists themselves) and the selection and compensation of producers (sometimes the artists pay producers out of their own pockets) are not considered.

26. Although a variety of entities may own copyrights to a sound recording, the term "record company" will be used synonymously with the owner of a sound recording. A single song may be recorded several times by the same record company or by different record companies, as in a studio version, a live version, various "re-mixed" versions, "cover" versions by different artists, or a re-mastering of original recordings. It is important to note that a record company has ownership rights only to its *own* recordings of the song, not to *any* recording of the song. This is amplified in the discussion of compulsory licenses in Part III.B of this Note. See, e.g., 17 U.S.C. § 114(b) (Supp. IV 1998).

### III. WHERE IT'S AT: THE CURRENT STATE OF COPYRIGHT PROTECTION FOR MUSIC RECORDINGS

#### A. *The Nature of Copyrights*

Copyright law today is governed almost entirely by federal statute.<sup>27</sup> According to the Copyright Act of 1976, copyright protection extends for a limited period of time to original works, including songs, as soon as they are expressed in a “tangible medium of expression.”<sup>28</sup> For a composer, this means that automatic copyrights are granted to a song once it is reduced to written music notation or when a simple recording of the song is made. The copyrights are the ownership interests that are then licensed to the publisher. For a record company, the record is copyrighted once it has been reduced to a tangible form such as a master tape, and the copyright extends to all reproductions of the master tape that are made by the record company (such as CDs, audio cassettes, and of course MP3 files).<sup>29</sup>

Publishers of songs have, subject to certain exceptions, exclusive rights in the form of a temporary monopoly to do or authorize all reproductions and distributions of songs in the form of phonorecords (or sound recordings), the preparation of all derivative works based on the songs, and every public performance of the songs.<sup>30</sup>

Record companies traditionally only own the rights to reproduce and distribute their sound recordings and to prepare derivative works based on them; no display or performance rights to sound recordings were granted.<sup>31</sup> However, in 1995, a performance right was provided for sound recordings in limited circumstances.<sup>32</sup> A brief examination of each of the relevant rights belonging to publishers and to record companies is useful.

1. *The Reproduction Right.*—The exclusive right to reproduce one’s works includes both partial and complete copying and exists regardless of whether the

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27. For the sake of simplicity, this Note considers only the 1976 Copyright Act and its subsequent amendments; however, songs published before 1978 are still governed by the 1909 Copyright Act until their copyrights expire, at which point the works enter the public domain. State common law may also still protect certain rights not preempted by the 1976 Copyright Act. *See id.* § 301 (1994).

28. *Id.* § 102(a). The duration of copyright protection is defined in *id.* §§ 303-305.

29. See PASSMAN, *supra* note 22, at 206 for further examples of tangible expressions of music.

30. *See* 17 U.S.C. § 106 (1994 & Supp. IV 1998). Although as the discussion above details, the reproduction and distribution rights are the main rights that are sold or licensed to the record company in the record deal.

31. *See id.* § 114(a) (Supp. IV 1998).

32. *See* The Digital Performance Right in Sound Recordings Act (1995), codified at 17 U.S.C. §§ 106(6), 114(b), 115(c)(3)(A) (1994 & Supp. IV 1998). See *infra* Part IV for a closer look at the Digital Performance Right in Sound Recordings Act.

copies are made for private or public use.<sup>33</sup> For publishers, the right to reproduce their songs means they have the right to make copies of the tangible forms of their songs, including sheet music to the song or even recordings of the song made by the publisher. If a contract has been made between the publisher and a record company, the publisher has licensed, in exchange for royalties, the reproduction right for that particular recording of its song since whenever the record is reproduced, the song is reproduced too. However, the Copyright Act provides a limit to the otherwise “exclusive” reproduction right of music publishers: once a publisher has allowed a song to be recorded, that song can then be recorded by anyone else.<sup>34</sup> Thus, a record company does not necessarily have to negotiate a contract with a publisher in order for it to be able to make recordings of the publisher’s previously recorded songs. While publishers are free to arrange for multiple recordings of their songs, they cannot prevent anyone else from making a recording of their songs. A record company does not need the publisher’s permission to record that publisher’s music; the company only pays a statutory license fee to the publisher.<sup>35</sup> For other forms of reproduction, like sheet music, the publisher retains full exclusive rights.

Record companies acquire the exclusive right to reproduce copies of their products. This applies to the words and graphics found on the label and other packaging material accompanying the recording, and to the sequence of sounds contained in the recording—usually originating in a master tape—as reproduced in the form of mass-produced CDs, audio cassettes, or even MP3 files posted on the company’s web page. “Reproduction” is understood to mean producing a “material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form from which it can be ‘perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.’”<sup>36</sup> In the case of sound recordings, only the actual recorded sounds from the sound recording are protected; the right does not protect against reproductions that merely simulate or imitate the sounds in the sound recording.<sup>37</sup>

In the digital age, records are increasingly being transmitted digitally over telephone lines and cable lines, both directly and on the Internet. The expansion of the ways to acquire music adds complexity to the understanding of record reproduction and distribution. The recent Digital Performance Right in Sound Recordings Act (1995) amended section 115 of the Copyright Act to recognize the nascent digital reproduction and distribution of music.<sup>38</sup> This means that when a record of a musical work is created and digitally transmitted to a receiver, for the intended purpose that the receiver making a copy of the record as it is received, then both a reproduction and a distribution have occurred, and a

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33. See 17 U.S.C. § 106(1) (1994). This is true by inference from the language of section 106, because the performance and display rights are qualified with the adjective “public.”

34. See *id.* § 115(a)(1).

35. See *infra* Part III.B for a discussion of these “compulsory” or “mechanical” licenses.

36. H.R. REP. NO. 94-1476, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675.

37. See 17 U.S.C. § 114(b) (1994 & Supp. IV 1998).

38. See *id.* § 115(c)(3)(A) (Supp. IV 1998).

compulsory fee must be paid. These types of transmissions are called “digital phonorecord deliveries.”<sup>39</sup>

2. *The Distribution Right.*—As in the reproduction right, publishers have the right to distribute copies of their songs to the public, although those rights are also typically sold or licensed to record companies with respect to particular recordings of songs.<sup>40</sup> As noted above, publishers may maintain the right to distribute other forms of their songs such as the sheet music. Similarly, record companies acquire the exclusive right to distribute to the public the records they produce. However, the right to distribute is limited to the first sale of each copy, according to a concept known as the First Sale Doctrine. In other words, a record company has the exclusive right to make the initial sale of each record it manufactures, but once someone has lawfully acquired a copy of a copyrighted work, that person is entitled to re-sell that particular copy to someone else, even at a profit, without the record company’s permission.<sup>41</sup>

3. *The Right to Prepare Derivative Works.*—A derivative work is defined as a work that is based upon a preexisting work (as in a song or a recording of a song) which consists of “editorial revisions, annotations, elaborations, or other modifications [that] as a whole represent [the] original work.”<sup>42</sup> That is, an actual part of the original work must be incorporated into the new work for it to be considered a derivative work.<sup>43</sup> The derivative work itself is also copyright protected, just like any other work, as soon as it is reduced to a “tangible medium of expression.”<sup>44</sup> Owners of rights to songs or recordings of songs also have copyrights to works derived from those songs or recordings. For instance, a recording that is based on “samples” taken from an earlier recording may be a derivative work of both the original recording and the original song.<sup>45</sup>

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39. *Id.* Note that the distribution may also be a protected public performance of the record, with implications for those with performance rights, namely publishers.

40. *See id.* § 106(3) (1994).

41. *See id.* § 109(a). For a further twist to distribution rights, see *id.* § 109(b)(1)(A). The music and software industries, wielding their considerable political muscle, lobbied for and received an amendment to section 109 that prohibits the lending, rental, or leasing for profit of records or computer software without the permission of those who, in the case of records, own the copyrights in both the sound recording and the underlying music. Hence there are no music or software “Blockbuster” stores.

42. *Id.* § 101.

43. A song based on a story in a novel would not be a derivative work of that novel unless the song’s lyrics come from the actual text of the novel, thereby incorporating portions of it into the song. *See id.* § 114(b) (limiting the scope of the right to derivative works in sound recordings to those derivative works that reproduce actual sounds from the original sound recording).

44. *Id.*

45. A recent example of this phenomenon is the royalty settlement arranged between the British rock group The Verve and the Rolling Stones’ publisher—The Verve’s 1998 hit “Bittersweet Symphony” was based on a sampled guitar riff from the Rolling Stones’ song “The Last Time.” *See* Paul Sexton, *Bittersweet Synergy*, ADWEEK E. EDITION, Oct. 26, 1998, available in 1998 WL 10549389.

4. *Performance Rights.*—The publisher maintains the exclusive right to perform its songs in public.<sup>46</sup> This encompasses live performances of the song in public, including “covers” of songs by other artists and the broadcasting of songs over the radio.<sup>47</sup> Understandably, it is virtually impossible for an individual publisher to enforce the performance right for every song, given the enormous number of ways that songs can be performed. Everyday examples include the local bands who play throughout the country in bars, restaurants and other venues for live music, and the large variety of radio broadcasts, such as low-frequency college and high school radio broadcasts. Publishers handle this problem by contracting with performance rights societies. These nonprofit organizations serve as agents for securing performance fees for the publishers’ material.<sup>48</sup> The two dominant societies are American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Incorporated (BMI). These societies negotiate “blanket licenses” with users such as radio stations and nightclubs.<sup>49</sup> Blanket licenses give the users a license to perform all of the songs owned by all of the publishers who have contracted with the performance right society, in exchange for one fee.<sup>50</sup> The society then pays a share of the fees to the publishers.<sup>51</sup> Thus, for example, radio stations pay fees to performance rights societies for the songs they broadcast; the performance rights societies pay the publishers, who in turn pay the composers.

Performance rights in recordings, until recently, fared differently. For most of the history of copyright law no copyright was available for the public performance of sound recordings.<sup>52</sup> Thus, following the radio example, record companies receive nothing when a song is broadcast on the radio (although they do arguably still benefit from the record sales that accrue from radio play). However, in response to the technological changes brought by digital audio files and Internet radio broadcasting, foreshadowing the eventual digital distribution of music over telephone and cable lines, the 1995 Digital Performance Right in

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46. See 17 U.S.C. § 106(4) (1994 & Supp. III 1997).

47. See *id.*

48. See PASSMAN, *supra* note 22, at 230-35. Over \$800 million has been generated by performance rights societies for their members, constituting the main source of income for music publishers. See Nancy A. Bloom, *Protecting Copyright Owners of Digital Music: No More Free Access to Cyber Tunes*, 45 J. COPYRIGHT SOC’Y U.S.A. at 179, 197 (1997).

49. Even though the nightclub owners themselves are not the performers of the songs, they could still be liable for infringing performances under a theory of vicarious infringement. Thus it behooves them to protect themselves through blanket licensing with performance rights societies.

50. The use of these blanket licenses may give the impression that these licenses are somehow compulsory—that is, that the publisher has no choice or control over who may or may not “cover” their songs. While practically speaking this may be true, in fact these licenses are voluntary. Publishers maintain the exclusive right under the Copyright Act to control the public performances of their songs and therefore, theoretically could choose to deny permission to perform its songs in public. For comparison, see *infra* Part III.B. for a discussion of compulsory licenses.

51. See PASSMAN, *supra* note 22, at 231-32.

52. See 17 U.S.C. § 114(a) (1994).

Sound Recordings Act recognized that certain digital audio transmissions of sound recordings constitute a public performance.<sup>53</sup> The Act further provides a compulsory license for publishers and record companies for these transmissions under certain conditions.<sup>54</sup> Thus in limited circumstances record companies join music publishers in receiving royalties for licensing performance rights.

### B. *Compulsory Licenses*

It would seem that an implication of a copyright being “exclusive” is that the copyright owner can choose to withhold permission for the copying of the work by another, or that the owner is the one who has the privilege of deciding who gets to exercise the copyrights to the work, for example by licensing the use of the copyrighted work for a negotiated fee (known as a “voluntary license”). Nevertheless, for the reproduction and distribution rights to songs, Congress has limited music publishers’ “exclusive” reproduction rights to only a right to collect compulsory license fees. A compulsory license is a license that is mandated by statute to permit otherwise infringing uses of a copyrighted work in exchange for the payment by the user of statutorily determined royalties to the copyright owner.<sup>55</sup> They are “compulsory” because the permission by the copyright owner for these uses cannot be denied and the formula for determining the license is set by statute.

Congress, fearing monopolies by music publishers over the recording of songs, enacted compulsory (also known as “mechanical”) licenses to permit others to make new recordings of previously-recorded songs.<sup>56</sup> Section 115 of the Copyright Act provides that once a song has been recorded and publicly distributed, the publisher is required to license the song, in exchange for a fee, to anyone else who wants to record and distribute the song.<sup>57</sup> Thus anyone is entitled to make and sell a recording of a previously recorded song, provided the requisite license fee is paid to the song’s owner, the publisher.

Just as nonprofit organizations like ASCAP assist publishers in collecting

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53. See 17 U.S.C. § 101 (1994 & Supp. III 1997).

54. See *id.* §106(6). The Act requires that the performances be digital (as opposed to analog), that it be audio-only, and that the transmission be a part of a subscription transmission in which the listener has paid the provider to receive the transmission. For the specific requirements for entitlement to compulsory licenses for these transmissions, see *id.* § 114(d).

55. See PASSMAN, *supra* note 22, at 208-12 for a helpful summary of compulsory licenses.

56. For the rationales behind compulsory licensing, see H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 107 (1976), *reprinted* in 1976 U.S.C.C.A.N. 5659, 5722; H.R. REP. NO. 83, 90th Cong. Sess., *reprinted* in 11 COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman ed., 1976).

57. See 17 U.S.C. § 115. Additional compulsory licenses are paid by the Public Broadcasting System (§ 118), owners of jukeboxes (§ 116), and cable and satellite television companies for the copying and rebroadcasting of programs in areas with weak television reception (§ 119). Certain digital performances and the digital distribution of records are also subject to compulsory licenses under the Digital Performance Right in Sound Recordings Act, as discussed *infra* Part IV. See also 17 U.S.C. § 106(6).

license fees for the public *performances* of their songs, organizations are also available to help publishers collect the compulsory license fees for the *recording* and *distribution* of their songs. The Harry Fox Agency is the most prominent organization that is dedicated to collecting license fees from record companies on behalf of publishers.<sup>58</sup>

### C. Infringement of Copyrights

The use of a copyrighted work by a non-owner, that conflicts with any of its copyrights and that fails to qualify as an exception (such as fair use), is an infringement of the copyright.<sup>59</sup> Only one right need be infringed to constitute an infringement; conversely, a single act can infringe on multiple rights.<sup>60</sup> The Copyright Act confers a private right of action for copyright owners against infringers.<sup>61</sup>

Infringement can also be a federal crime.<sup>62</sup> At one time the law required that in order to bring criminal charges against an infringer, the infringer had to have made a profit from the infringing activities.<sup>63</sup> Because of piracy on the Internet by individuals who are not interested in benefitting financially from their exploits, this is no longer the case. Now, infringers who reproduce and distribute more than \$1000 worth of copies of copyrighted works, even if with no financial gain, will face criminal charges.<sup>64</sup>

Infringement can also be vicarious. A third party can incur liability by enabling infringement by someone else providing the third party had control over the infringement and derived profit from it.<sup>65</sup> As will be discussed below, this

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58. See PASSMAN, *supra* note 22, at 211. These compulsory licenses are now widely used as merely a benchmark in negotiations for royalties owed to publishers from sales of records. See also Bob Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, 20 No. 4 ENTERTAINMENT LAW REP., Sept. 1998, at 6-7, for an introduction to the Harry Fox Agency.

59. See 17 U.S.C. § 501 (1994) (providing remedies for copyright infringement). Infringement need not be intentional. See also *Pinkam v. Sara Lee Corp.*, 983 F.2d 824, 829 (8th Cir. 1992) ("The defendant's intent is simply not relevant: The defendant is liable even for 'innocent' or 'accidental' infringements.").

60. See 17 U.S.C. § 501 (1994).

61. See *id.* § 501(b).

62. See *id.* § 506 (1994 & Supp. III 1997).

63. The old version of § 506(a) read as follows: "Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be punished as provided in section 2319 of title 18." *Id.* § 506(a) (1994).

64. See *id.* §§ 101, 506(a), as amended by the No Electronic Theft Act ("NET") (1997). The NET Act amended § 101 ("financial gain" definition) and § 506(a). The legislation was enacted in response to a Massachusetts case that had been dismissed because the defendant had not benefitted financially from his practice of encouraging users to download unauthorized copies of computer games from his bulletin board service. See *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994).

65. See *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F. 2d 354 (7th Cir.

potential liability is particularly salient for web site owners and Internet service providers who may find themselves liable for the infringing actions of their users.

Civil remedies for infringement include injunctive relief, the impounding and destruction of unlawful copies, actual damages, or potentially large statutory damages, costs, and attorneys fees.<sup>66</sup> The criminal penalties range from fines to up to five years in prison.<sup>67</sup>

#### *D. A Limit to Copyright Protection: The Fair Use Exception*

Despite the broad and overlapping rights accorded to songs and records, as well as the extensive system of compulsory licenses to compensate music publishers, copyrights are not absolute. In fact, exceptions are built in to the granting of the rights. In section 106 of the Copyright Act, included with the enumeration of the rights of copyright owners, fifteen exceptions are referenced—corresponding to sections 107-121.<sup>68</sup> These exceptions include certain reproductions by libraries and archives, the First Sale Doctrine, and certain performances and displays in front of students.<sup>69</sup> Perhaps the most important of these exceptions is the fair use exception.

Section 107 permits some uses of copyrighted works that would otherwise be infringing by recognizing them as “fair uses,” thereby providing an affirmative defense to copyright infringement.<sup>70</sup> As the preamble to section 107 states, fair uses generally serve the public interest through such endeavors as scholarship, teaching, criticism, commentary, research, and news reporting.<sup>71</sup>

To help courts determine whether a particular use is fair (and assuming of course that it would be otherwise an infringement), section 107 provides four factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the

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1929).

66. See 17 U.S.C. §§ 502-505 (1994). An owner’s entitlement to some of these remedies depends on whether the work was formally registered with the Copyright Office prior to the infringement. The details concerning registration are important for copyright owners, but are beyond the scope of this Note.

67. See *id.* § 506 (Supp. IV 1998); 18 U.S.C. § 2319 (1994 & Supp. IV 1998).

68. See 17 U.S.C. § 106-121 (1994 & Supp. IV 1998). The grounds for reading the exceptions of sections 107-121 as being incorporated into section 106 by reference came recently from the United States Supreme Court in *Quality King Distributors, Inc. v. L’Anza Research International, Inc.*, 523 U.S. 135 (1998).

69. See 17 U.S.C. § 106-121 (1994 & Supp. IV 1998).

70. See *id.* § 107 (1994).

71. See *id.*

copyrighted work.<sup>72</sup>

These factors have not been interpreted as exclusive.<sup>73</sup> What they have in common is a focus on the conduct of the alleged infringer and the nature of the thing used and not the status of the user. Thus, in addition to the scholars, teachers, journalists, and others who serve the public interest, home users have also been allowed the fair use of copyrighted works in certain circumstances. In *Sony Corp. of America v. Universal City Studios, Inc.*,<sup>74</sup> the Supreme Court held that the time-delayed video taping of television programs by home consumers constituted fair use.<sup>75</sup> Similarly, and relevant to the world of music, the Audio Home Recording Act of 1992 finds certain non-commercial copying of digital audio recordings non-infringing.<sup>76</sup>

There is no question of the fundamental importance in the United States of protecting copyrights, particularly since protecting these rights is a specifically enumerated power of Congress in the U.S. Constitution.<sup>77</sup> Some theorists claim that the primary goal of securing copyrights is to reward a private benefit to authors and inventors in the form of a temporary monopoly in their works since authors have a "natural right" to the fruits of their labor; any benefit to society ensuing from these works is secondary and incidental.<sup>78</sup> However, in recognition of the constitutional function of fair use, the U.S. Supreme Court has determined that the founding fathers' intention was to place the benefit to the public that accrues from authorship at the forefront, and the private reward received by the author is secondary.<sup>79</sup> In *Sony*, Justice Stevens, quoting Chief Justice Hughes, noted that "[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."<sup>80</sup> The relation between rewarding authorship and benefitting

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72. *Id.*

73. See, e.g., *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1260 (2d Cir. 1986) (stating that "the doctrine is an equitable rule of reason . . . each case raising the question must be decided on its own facts"), cert. denied, 481 U.S. 1059 (1987). The Second Circuit has also analyzed the denial of permission by the copyright owner and the commission of errors by the alleged infringer. See *id.* at 1260-61, 1264.

74. 464 U.S. 417 (1984).

75. See *id.* at 449-50.

76. See 17 U.S.C. § 1008 (1994).

77. See U.S. CONST. art. I, § 8: "The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

78. For a discussion of the author-centered approach to the justification of copyrights, see MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 12-17 (1995).

79. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) ("[T]he primary objective of copyright is not to reward the labor of authors, but to 'promote the Progress of Science and the Useful Arts.'").

80. *Sony Corp. of Am.*, 464 U.S. at 429 (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)).

society exists in a type of balance—"the rights of owners to control and exploit their works, and society's demand to use, to learn from, and to build upon the same materials."<sup>81</sup>

Acting consistently with its desire to nurture the development of the "useful arts" for the benefit of the public, Congress codified in section 107 the traditional common law privilege of fair use.<sup>82</sup> The fair use exception is a long-standing recognition of the worthiness of tipping the balance in favor of society's "demand to use" in certain circumstances, permitting certain otherwise infringing uses of copyrighted works. Since fair use is justified by tying it to the very purpose of copyright protection—to benefit the public—it should be viewed as indispensable. Although our emergent digital, online society is making it more and more difficult for copyright owners to maintain control over their works, it should be an imperative of those attempting to adapt the law to new technology that the devices of the information age not preclude opportunities for fair use. As the conflict rages over digital music recordings, particularly those surrounding MP3 files, fair use risks getting lost in the maelstrom.

#### IV. BALL OF CONFUSION: FITTING MP3 INTO THE COPYRIGHT FRAMEWORK

Now that the nature of copyrights and the fair use exception has been outlined, a framework exists to analyze where the use of MP3 music files fits under the Copyright Act. Users of MP3 files will need to know which uses are infringing, whether permission for their uses (i.e., a voluntary license) is required or whether the mere payment of a compulsory license will suffice, and, perhaps most important, who gets paid the fee—the publisher, the record company, or both? Further, when might an otherwise infringing use constitute fair use?

The key to answering these questions emerges from an analysis of the thorny and controversial problems of whether the manner in which these files are made and used constitutes a performance, a reproduction, a distribution, or perhaps even simultaneous uses. This analysis is particularly necessary for understanding the implications of the transmission of MP3 files over the Internet.

##### *A. MP3 Transmissions as Performance*

"Performance" is defined in the Copyright Act. Section 101 states that "[t]o 'perform' a work means to recite, render, play, dance, or act it, either directly or by any means of any device or process . . . in its images in any sequence or to make the sounds accompanying it audible."<sup>83</sup>

"Performance" becomes relevant to the use of MP3 files when they are transmitted over the Internet via web sites that operate like conventional radio stations in a medium known as "webcasting." However, it is important to make a distinction between two types of transmissions. Some digital audio

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81. KENNETH D. CREWS, *COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES* 3 (1993).

82. See 17 U.S.C. § 107 (1994).

83. *Id.* § 101.

transmissions are only transmissions and nothing else. That is, the MP3 files are "broadcast" out to Internet users much like songs are broadcast out into the air by radio. These can be thought of as "pure transmissions." Other transmissions, however, result in an identifiable copy of the song being received by the recipient of the transmission, as in the actual downloading of the song as an MP3 file. These transmissions are called "digital phonorecord deliveries."<sup>84</sup> The former type of transmission is relevant here, for the purposes of figuring out *performance* rights; digital phonorecord deliveries will be discussed in the context of reproduction rights.<sup>85</sup>

When a webcaster broadcasts music in the form of MP3 files (or any other digital format) in a manner analogous to a radio broadcast, the songs are being publicly "performed" by the means or process of the data's streaming from one site to another, in that the transmissions are potentially available to Internet users generally. As discussed above, publishers have under section 106(4) an exclusive right to the public performance of their songs. Thus, like radio broadcasters, webcasters of MP3 files should negotiate a blanket license arrangement with the performance rights societies such as ASCAP and BMI for songs that are transmitted.<sup>86</sup> This is generally true for all types of digital audio transmissions.<sup>87</sup>

A more difficult question is whether the record companies should also get a performance royalty from pure transmissions of digital audio files. Remember, no general right exists in the public performance of sound recordings.<sup>88</sup> However, a performance right to sound recordings has been provided for certain types of digital audio transmissions under the Digital Performance Rights in Sound Recordings Act ("DPRSRA").<sup>89</sup> To qualify as a "digital audio transmission" there must be a transmission that is digital (not analog) and audio only (since audiovisual works are already covered in section 106(4)).<sup>90</sup> A transmission is the communication of a work "by any device or process whereby images or sounds are received beyond the place from which they are sent."<sup>91</sup> Under this definition, webcasting MP3 files would seem to constitute a digital

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84. Kohn, *supra* note 58, at 7. Digital audio transmissions are addressed in 17 U.S.C. § 114 (1994 & Supp. III 1997); digital phonorecord deliveries are addressed in *id.* § 115.

85. However, the performance rights societies (BMI, ASCAP, SESAC) may be taking the controversial position that a digital phonograph delivery is both a reproduction which entitles publishers to a receive a mechanical license AND a performance which entitles them to their negotiable blanket licenses. See Kohn, *supra* note 58, at 9. The language of section 115(c)(3)(A) is sufficiently vague to provide support for this position.

86. See Kohn, *supra* note 58, at 9. Several web sites have already entered into blanket license agreements with ASCAP and/or BMI. See Bloom, *supra* note 48, at 197-98.

87. In fact, Bloom suggests that the mere posting of an MP3 file may still be considered a public performance, even if no one accesses it. See Bloom, *supra* note 48, at 195.

88. See discussion *supra* Part III.B.4; see also Kohn, *supra* note 58, at 5.

89. 17 U.S.C. § 106(6) (1994 & Supp. IV 1998).

90. See Kohn, *supra* note 58, at 3.

91. 17 U.S.C. § 101 (1994).

audio transmission. On this basis, RIAA has independently contacted MP3 webcasters requesting that they pay performance license fees to record companies for all of the pure transmissions of MP3 versions of their recordings.<sup>92</sup>

RIAA may be overreaching, however. Identifying the webcasting of MP3 files as a pure transmission does not end the question. The scope of the DPRSRA is limited by certain conditions and exemptions enumerated in section 114.<sup>93</sup> Further, pure transmissions consist of two types: one type of transmission occurs at the request of the recipient as part of an interactive service, and the other does not. An interactive service is defined as a service that “enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient.”<sup>94</sup> The ability merely to request a recording is not enough to make the service interactive; to be interactive the user must also be able to receive the transmission on request.<sup>95</sup> Since users will thus be able to receive music upon request and at will (with a fee paid to the interactive service), these services will likely be used to bypass the purchase of the recording. These are the sort of transmissions that are contemplated by section 106(6), and therefore record companies are entitled to licensing fees from the “performance” via these types of transmissions.<sup>96</sup> The fees for the license are not defined by the statute, but are negotiable between the record company and the webcaster who provides the interactive service. Implicitly as well, the license is itself voluntary—it can be denied by the record company.

Pure transmissions that are not part of an interactive service also come in two types, subscription and non-subscription transmissions.<sup>97</sup> A subscription transmission is defined as one that is “controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission.”<sup>98</sup> A common example of a subscription transmission is an online bulletin board service for which users pay a fee to gain access to data posted on the electronic bulletin board. For the same reasons that were articulated for interactive services, subscription transmissions require licenses for both the performance of the song (from the publisher) and for the performance of the sound recording (from the record company) under section 114(d).<sup>99</sup>

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92. See Kohn, *supra* note 58, at 3.

93. See 17 U.S.C. § 114(d) (Supp. IV 1998).

94. *Id.* § 114(j)(4).

95. See *id.*

96. See *id.* § 114(d)(1) (1994 & 1996 Supp. II).

97. See Kohn, *supra* note 58, at 12.

98. 17 U.S.C. § 114(j)(8) (1994 & Supp. III 1997).

99. Section 114 is actually more complicated: for some transmissions in which there is a greater risk of loss of record sales, the statute provides for voluntary licensing, meaning the record company can negotiate the fees or even withhold permission for the license; other types of subscription transmissions only require the familiar compulsory licenses, which the record companies are required to give in exchange for statutory fees. See *id.* § 114(d).

Non-subscription transmissions, which most closely resemble traditional radio broadcasts, should not require a license to the record company. However, it is precisely these sorts of transmissions that the recording industry claims are subject to voluntary licensing.<sup>100</sup> Yet section 114(d) clearly intends to exempt transmissions that are non-interactive and non-subscription, in other words, transmissions that resemble today's radio broadcasts:

The greater part of Section 114(d) is intended to make it clear that public performances of sound recordings over the radio continue to be free of any requirement of a license from the owners of the sound recordings, even though such performances are by means of digital audio transmissions, provided they are not part of an interactive service, and are made on a non-subscription basis.<sup>101</sup>

In summary, MP3 webcasters must first receive permission from music publishers for all pure digital transmissions of copyrighted songs. Webcasters can contract with performance rights societies to receive blanket licenses. Second, while there remains no general performance right for sound recordings, there is a specific delineated performance right in certain digital audio transmissions for which record companies may choose to grant licenses for negotiated fees. These "performances" are the types of transmissions that are most likely to affect the actual market for the record companies' records, such as interactive transmissions and certain non-interactive subscription transmissions. Other types of non-interactive subscription transmissions may only require compulsory licenses. Non-interactive, non-subscription pure transmissions, however, are currently exempted from any licensing from record companies.

### *B. Reproduction and Distribution of MP3 Files*

Grounds may exist for recognizing a reproduction/distribution mechanical license for publishers from a pure transmission received from an interactive service, even though no actual "copy" was made by the recipient. The ease of access to songs by request from interactive services could conceivably replace the need to purchase an actual physical copy of the record or even to purchase a digital phonorecord delivery of the song. Therefore, some organizations, including the Harry Fox Agency, argue that these transmissions should be subject to the same compulsory mechanical licenses that record companies pay to publishers.<sup>102</sup> Conceptually, it has already been asserted that such a transmission

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100. See Kohn, *supra* note 58, at 18.

101. *Id.*

102. See *id.* at 12. This raises a troubling issue of "double-dipping" by music publishers. From a single transmission by an interactive service, a publisher would claim entitlement to fees from the public performance of the transmission, paid to ASCAP or BMI on their behalf (as if it were a radio broadcast) *and* claim entitlement to a mechanical license fee as if it were equivalent to a phonorecord delivery, paid to Harry Fox on their behalf (as if it were a royalty from the sale of a record). There is language in the statute to support such a proposition. Section 115, addressing

can be both a public performance and a reproduction/distribution of a record.<sup>103</sup>

In contrast to the “pure” transmission of digital recordings, some transmissions result in the recipient actually receiving a fixable copy of the record. These transmissions are called digital phonorecord deliveries.<sup>104</sup> A commercial purchase of an MP3 file from a web site is an example of a digital audio transmission that results in a digital phonorecord delivery. For each copy, publishers are entitled to the compulsory mechanical license fees provided in section 115 and usually collected by the Harry Fox Agency on the publishers’ behalf, just as in other reproduction/distribution licenses.<sup>105</sup>

Record companies are in the same position they would be in for any other reproduction of their sound recordings—the position to grant voluntary licenses. Web sites that seek to make digital phonorecord deliveries of records therefore must receive the permission of the record company and pay the negotiated fee.

#### V. HERE, THERE, AND EVERYWHERE: WHO IS LIABLE FOR INFRINGING USES OF MP3 FILES?

Despite, or perhaps due to, the complex framework for voluntary and compulsory licensing for digital recordings, ample opportunities remain for copyright infringement with the use of MP3 files. The infringement can range from an innocent misunderstanding of the law to willful piracy designed to separate publishers and record companies from their profits. A common example of infringement would be fly-by-night web sites posting MP3 files and encouraging visitors to listen to and/or download (and keep or redistribute) copies of the files, either for free or after payment to the web site owner, who neither compensates nor has permission from the record company or the publisher.

There is currently no authority that regulates the Internet to police copyright infringements.<sup>106</sup> Thus, copyright owners are essentially responsible for their own enforcement. Publishers and record companies have conceptually three potential targets when enforcing their copyrights in this scenario: those who

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licenses for phonorecord deliveries, says its provisions do not apply to *exempt* transmissions under section 114(d)(1). 17 U.S.C. § 115(c)(3)(L) (1994 & Supp. III 1997). Because interactive transmissions are *not* exempt, arguably section 115 would apply to them as well. However, the whole purpose in recognizing a performance right in these particular sound recordings is to address the problem of their equivalency to reproduction/distribution.

103. The White Paper from the Working Group on Intellectual Property Rights (September 1995) has stated that transmissions of phonorecords are both a distribution and a public performance. See Delaney & Lichstein, *supra* note 14, at 113-14.

104. See Kohn, *supra* note 58, at 8.

105. See 17 U.S.C. § 115 (1994 & Supp. III 1997). In addition, publishers are asking for performance fees (via ASCAP and BMI) for each digital phonorecord delivery, on the basis that section 115 implies that a digital phonorecord delivery can also be a public performance. See Kohn, *supra* note 58, at 9, 10.

106. See Bloom, *supra* note 48, at 180.

create the web sites, the consumer who appropriates the copyrighted material, or the Internet Service Providers (ISPs) who provide the server for the web site.

#### *A. Web Site Owners*

Renegade web site owners are a logical choice for copyright owners' enforcement activities since they are the direct infringers in the scenario described above. Unfortunately, the ubiquity of web sites maintained by ordinary people, the ease with which MP3 files can be made, posted, copied, and played, and the online community's growing appreciation for the quality and efficiency of the MP3 file format all make catching, not to mention preventing, infringement very unlikely. Moreover, even when an infringing site is found, it is very difficult to pin down the people responsible for the site. Recent lawsuits directly addressing MP3 postings have been stymied when the web sites simply disappear after restraining orders have been issued.<sup>107</sup> These web sites may reappear in a different location. If damages are sought in addition to an injunction, another consideration is the fact that most of the smaller web sites (who are likely to be the most flagrant infringers) are likely to be judgement-proof.

#### *B. Home Users*

Ordinarily, the exposure of home users to liability for copying MP3 files stems from the principle that a fixed copy of a file is made when it is downloaded from an online source to a disk drive. In fact, a fixed copy is made even when a file is uploaded from a disk drive into random access memory (RAM), even though its existence is only temporary.<sup>108</sup>

However, the Audio Home Recording Act of 1992, codified as Chapter 10 of the Copyright Act,<sup>109</sup> may protect some consumers. Section 1008 permits noncommercial consumer copying of both digital and analog material.<sup>110</sup> Therefore "ripping" songs from one's own CDs for the purpose of creating MP3 files for playing on a computer (or on the new portable Rio) should be considered the equivalent of making an audio cassette of a CD for one's own home use. Although the impetus for enacting the Audio Home Recording Act was the development of digital audio tape (DAT) technology that allowed people to create CD-quality cassette tapes of their CDs in their homes, there are reasons to believe that section 1008 may also be applicable to MP3 files received from Internet transmissions.<sup>111</sup> The act defines a "digital audio copied recording" as

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107. See, e.g., A&M Records, Inc. v. Internet Site Known as Fresh Kutz, No. 97-CV-1099 H (S.D. Cal. filed June 10, 1997). It and a similar case are discussed in Delaney & Lichstein, *supra* note 14, at 104.

108. See MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993).

109. 17 U.S.C. §§ 1001-10 (1994); other provisions of the Audio Home Recording Act protect copyright owners. These other provisions are discussed in the Conclusion of this Note.

110. See *id.* § 1008.

111. See the discussion in Bloom, *supra* note 48, at 192.

“a reproduction in a digital recording format of a digital musical recording, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission.”<sup>112</sup> Thus, the reasonable “recording” of a song from a webcast in the privacy of the home for one’s own use may be recognized as the equivalent of making a digital cassette recording of a CD.

### C. Internet Service Providers

ISPs presented at one time an enticing target for copyright owners who were seeking to redress infringements on the Internet, on theories of either direct, contributory, or vicarious infringement. Compared to the number of individual web sites, there are relatively few ISPs. The ISAs are easier to target and are more likely to have sufficient resources to make lawsuits worthwhile. However, the recent Digital Millennium Copyright Act has clarified and limited the liability of ISPs.<sup>113</sup>

ISPs may be liable for direct infringement to the extent that they are directly responsible for infringing sites, for instance by providing subscription services in which MP3 files are transmitted upon request or by hosting bulletin boards in which MP3 files are posted and directly downloaded by visitors. As the discussion of sections 114 and 115 above suggested, the operators of subscription services are publicly performing the music and thus are subject to paying compulsory licenses to the copyright holders of sound recordings and voluntary licenses to music publishers. Conversely, operators of bulletin boards that allow visitors to download fixed copies of records are subject to paying voluntary licenses for the sound recordings and compulsory licenses for the songs.<sup>114</sup>

ISPs are therefore required to obtain licenses only to the extent that they provide subscription services or are directly responsible for infringing sites and not because they provide space on the Internet to others’ infringing subscription services or web sites.<sup>115</sup>

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112. 17 U.S.C. § 1001(1) (1994) (emphasis added).

113. See H.R. 2281, 105th Cong., 144 CONG. REC. H7074-03 (1998). The Digital Millennium Copyright Act is discussed *infra* Part VII.

114. The stage was also set for ISPs to be responsible for the payment of mechanical licenses—that is, the compulsory license that is paid to music publishers for the reproduction of their songs—before the passage of the 1995 Performance Right in Sound Recordings Act. In 1993, Frank Music Corporation, acting on behalf of the Harry Fox Agency, filed suit against CompuServe in the U.S. District Court in Manhattan. Frank Music claimed that CompuServe’s bulletin board service infringed their copyrights by providing a database of copyrighted musical works for its subscribers to download. The case reached a settlement before trial, in which in addition to paying damages, CompuServe agreed to a license agreement to provide future mechanical fees to Harry Fox. See Frank Music Corp. v. CompuServe Inc., No. 93 Civ. 8153 (S.D.N.Y. filed Nov. 29, 1993); Bloom, *supra* note 48, at 192-94; see also Delaney & Lichstein, *supra* note 14, at 97-98 (providing more details of the *Frank Music* case).

115. To be liable for direct infringement, it would have to be shown that the ISP actually engaged in infringing activity; “[m]erely encouraging or facilitating [infringing] activities is not

An ISP, however, may be liable for contributory infringement, if, having knowledge of an infringing site, it “induces, causes or materially contributes to the infringing conduct’ of the primary infringer.”<sup>116</sup> Even if contributory infringement is not found, the ISP may still be liable for vicarious infringement, where the ISP “(1) has the right and ability to control the infringer’s acts and (2) receives a direct financial benefit from the infringement.”<sup>117</sup> ISPs should not be allowed to ignore and allow infringement by those who make use of their space, particularly when they also profit from the infringement. However, for practical and policy reasons, ISPs should also not be pressured to censor or otherwise exert prior restraint on the activities of their members.

## VI. PARANOID ANDROIDS: THE INDUSTRY’S USE OF TECHNOLOGY TO PROTECT COPYRIGHTS

Because enforcement of copyrights on the Internet is so difficult, the music industry has turned to technological innovations with the aim of preventing infringement from occurring. Although these innovations may be successful, there are also troubling implications for the use of works in the public domain or for the fair use of copyrighted works, particularly if these innovations become mandatory.

Technology exists that can be included in the MP3 file compression process that would make the format more secure from the moment an MP3 file is made. Encryption technology that prevents the saving of MP3 files received from digital broadcasts, watermarks that embed the computer source of an MP3 file in the file itself, and the restriction of the playback of an MP3 file to one computer are all possible and in use in MP3 applications today.<sup>118</sup>

Congress has taken an interest in mandating the use of security technology. The Audio Home Recording Act of 1992 implements a Serial Copyright Management System for DAT devices.<sup>119</sup> DATs are audio cassette tapes that make CD-quality digital recordings. As a response to the danger of the mass production of CD-quality DATs copied from CDs, a Serial Copyright Management System is incorporated into DAT devices so that the device can make a copy of a CD onto a DAT, but it will not be able to make a copy from the

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proscribed by the statute.” *Playboy Enter., Inc. v. Russ Hardenburgh*, 982 F. Supp. 503, 512 (N.D. Ohio 1997). Indeed, ISPs have been resistant to entering into blanket license agreements because they are not the ones directly purveying the audio files found on web sites or on bulletin board services operated by private individuals on the Internet. *See Bloom, supra* note 48, at 198. For another example of a subscription bulletin board service, and not the ISP, being found liable for infringement, see *Sega Enterprises, Ltd. v. Maphia*, 948 F. Supp. 923 (N.D. Cal. 1996).

116. *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995) (citations omitted).

117. *Id.* Much of the holding of this case was codified in the safe harbor provisions of the Digital Millennium Copyright Act, discussed *infra* Part VII.

118. *See Robertson, supra* note 13.

119. *See* 17 U.S.C. § 1002 (1994).

copy. Thus while unlimited copies may be made from the original recording, copying a copy is always prevented.<sup>120</sup> Furthermore, Microsoft has also recently released MS Audio 4.0 which prevents the copying of music files that have been downloaded from the Internet.<sup>121</sup>

These are potentially very effective methods to prevent rampant piracy of digital sound recordings. They may, however, prove to be too effective if they also prevent justifiable copying, such as when the copyright owner seeks to make copies, the copying is fair use, or when the recording eventually enters the public domain. The problem with using mandatory technological measures to address infringement is that it impacts all devices indiscriminately. Copy protection devices on MP3 players and recorders are legally neutral entities that function whether the material is copyrighted or in the public domain, or whether permission to use a copyrighted work has been granted or not.

Nevertheless, Congress, apparently undaunted by such concerns, recently enacted new legislation that expands the Serial Copyright Management System requirements to cover other kinds of digital recordings, including MP3 files.

## VII. THE SHAPE OF THINGS TO COME: THE DIGITAL MILLENNIUM COPYRIGHT ACT

In October 2000, the recently passed Digital Millennium Copyright Act<sup>122</sup> (DMCA) will go into effect, and the copyright framework depicted above will change. Passed in November of 1998, the DMCA (H.R. 2281) creates Chapter 12 of the Copyright Act (titled "Copyright Protection Systems and Copyright Management Information") and implements both the World Intellectual Property Organization (WIPO) Copyright Treaty and the Performances and Phonograms Treaty.<sup>123</sup> The DMCA came as a response to the "ease with which flawless copies of copyrighted materials can both be made and transmitted in the digital network environment,"<sup>124</sup> of which MP3 formatting is the obvious example. It has been interpreted as creating a "paradigm shift" in copyright law that reflects Congress's change in focus "from 'giving minimal protection to works to providing maximum revenue flow to American companies.'"<sup>125</sup>

The DMCA contains three major components pertinent to MP3 files: a clarification of the responsibilities of ISPs in the transmission of digital recordings, new statutory licensing for digital audio transmissions, and most significantly, a sharp focus on the protection of encryption and other security technologies that protect the copyrights of digital materials.

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120. See PASSMAN, *supra* note 22, at 245-46.

121. See Maureen S. Dorney, *New High-tech Solutions for High-tech Infringement*, NAT'L L.J., May 17, 1999, at B5.

122. Pub. L. 105-304, 112 Stat. 2860 (1998).

123. See 144 CONG. REC. H7074-03 (Aug. 4, 1998).

124. *Id.* at H7096 (statement of Rep. Boucher).

125. Wendy Leibowitz, *The Sound of One Computer Copy*, THE NAT'L L.J., Nov. 2, 1998, at A16.

### *A. Safe Harbor for ISPs*

The DMCA protects ISPs with the Online Copyright Infringement Liability Limitation Act.<sup>126</sup> One of its purposes is to reduce the incentives on ISPs to censor their users.<sup>127</sup> The Act provides that an ISP will not be liable for infringement when it transmits, routes, or provides connections for material on its systems, when the following conditions are met: the transmission was initiated by someone other than the ISP; the transmission is an automatic process (meaning the ISP did not select the material to be transmitted); the ISP does not select the recipient of the transmission; no copy of the material is made that can be accessed by anyone other than an intended recipient; and no modification of the material occurs during transmission.<sup>128</sup> Thus, ISPs need not aggressively monitor webcasts for infringing transmissions of MP3 files.

An ISP is also not liable for the temporary storage of infringing material that occurs during the material's transmission, when the material was made available by someone other than the ISP, the material is transmitted without modification by the person who made it available to another person who requested it, and when the storage is only what is necessary for the transmission.<sup>129</sup> Similarly, an ISP would also not be liable for storing infringing materials at the direction of users, if the ISP does not know of the existence of the infringing materials (no actual knowledge, no awareness of the apparent signs of the materials, or if the ISP did have knowledge it took quick action to remove the materials), and the ISP does not receive any economic benefits attributable to the infringing materials (under the rationale that if no money is earned the ISP has no control over the material).<sup>130</sup> Thus an ISP will not be found liable for renegade web sites in its file servers that post MP3 files containing pirated material if the ISP is unaware of their presence.

### *B. Additional Requirements for Licensing Digital Audio Transmissions*

The status of record companies' public performance rights in non-interactive, non-subscription digital audio transmissions will change with the implementation of the DMCA. The language in section 114(d)(1) that exempted non-subscription transmissions from any licensing requirement has been changed to exempt only non-subscription "broadcast" transmissions.<sup>131</sup> Accordingly, "eligible non-subscription transmissions" that are not "broadcast" transmissions are now subject to compulsory licensing from record companies, just as subscription transmissions are in section 114(d)(2).<sup>132</sup> New eligibility

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126. 17 U.S.C. § 512 (found in 144 CONG. REC. H7079).

127. See 144 CONG. REC. H7092 (statement of Rep. Frank).

128. See 17 U.S.C. § 512(a) (found in 144 CONG. REC. H7079).

129. See 17 U.S.C.A. § 512(b) (West Supp. 1999).

130. See *id.* § 512(c).

131. See *id.* § 114(d)(1)(A).

132. *Id.* § 114(d)(2).

requirements have been added, including a requirement that transmitting entities take "reasonable steps to ensure, to the extent within its control, that the transmission recipient cannot make a phonorecord in a digital format of the transmission . . ."<sup>133</sup> What would constitute such "reasonable steps" is not clear. Other eligibility provisions limit the duration of the transmissions.<sup>134</sup> Transmissions that are neither exempt nor meet the eligibility requirements for statutory licenses must be permitted by the record company, however, the transmitter will have to pay the record company the agreed-upon license fee.

### C. *The Advent of an Encrypted Web?*

The DMCA takes copyright law in a new direction by focusing not only on the protected works themselves, but also on general types of security devices that protect digital works from infringement. The DMCA adds criminal penalties for the use of devices that circumvent copyright protection measures to the already existing criminal penalties for the infringement itself; specifically, section 1201 will prohibit the circumvention of any technological measures that control access to copyrighted sound recordings.<sup>135</sup> For instance, if Diamond Multimedia Systems negotiates with the RIAA to install a type of serial management system on its tiny MP3 player, the Rio, that would prevent or limit the ability to make copies of MP3 files; any interference with such a system would be a federal crime under the DMCA.

The prohibition will not apply to libraries, educational institutions, and other types of nonprofit institutions whose use of copyrighted works has traditionally been considered non-infringing fair use, if they are likely to be "adversely affected" by the prohibition in their abilities to make non-infringing use of copyrighted works.<sup>136</sup> Moreover, the implementation of the DMCA will not affect any other existing copyrights or defenses to copyright infringement, including the fair use privilege.<sup>137</sup> The DMCA encourages the private sector to develop technological measures that will enable nonprofit educational institutions and libraries to continue to create and lend copies of sound recordings while at the same time protecting copyright owners from infringements of their rights.<sup>138</sup> As a further showing of good faith, in the interim two-year period between the date the DMCA was passed and the date the Act goes into effect, the Secretary of Commerce must assess the impact of the new criminal provision on fair use and on the market for the copyrighted works.<sup>139</sup>

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133. 144 CONG. REC. H7084 (daily ed. Aug. 4, 1998) (statement of Rep. Cable).

134. See 17 U.S.C.A. § 114(d)(2)(iii) (West Supp. 1999).

135. See *id.* § 1201(a)(1)(A).

136. See *id.* § 1201(a)(1)(B).

137. See *id.* § 1201(c).

138. See 144 CONG. REC. at H7078-7079.

139. See 17 U.S.C.A. § 1201(a)(1)(C) (West Supp. 1999).

### VIII. TRAMPLED UNDER FOOT: THE FAIR USE OF SOUND RECORDINGS AND THE DMCA

The comprehensive and complex statutory licensing system that exists to compensate record companies and music publishers can be avoided if the reproduction or public performance of the songs and sound recordings is considered fair use. Uses of MP3 files made from copyrighted recordings that, in a general sense, are a benefit to society in a manner consistent with section 107 of the Copyright Act do not require the payment of mechanical or voluntary licenses and there may be permissible uses of MP3 recordings that will be recognized after analyzing the language of the preamble and the four factors in the fair use statute.<sup>140</sup> After all, the Supreme Court, interpreting the Constitution, said that, "the primary objective of copyright is not to reward the labor of authors, but to 'promote the Progress of Science and the useful Arts.'"<sup>141</sup> Unfortunately, the DMCA may have the unintended consequence of stifling this Constitutional mandate by encouraging the technological locking up of access to digital materials and providing mandatory payments for most types of digital transmissions. These measures are contributing to the commercialization and over-regulation of the Internet, which could narrow its early promise as a haven for the relatively unregulated flow of information worldwide.

The time before the October 2000 effective date for the DMCA, will determine the impact of Congress's desire to justly balance the "technical measures" that will be designed to protect copyrighted material against the fair use needs of non-profit libraries, educational institutions, and other organizations whose function is the dissemination of information. A risk exists that Congress will overreach and unnecessarily constrain lawful uses of copyrighted material or even access to uncopyrighted material.

Particularly problematic is the fact that technological security devices, like Serial Management Systems or password protections, do not distinguish between infringing and non-infringing uses. For instance, if MP3 recorders were

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140. See 17 U.S.C. § 107 (1994). For instance, a nonprofit fan-supported web site that reviews the music of a particular genre or recording artist may contain samples from recent records. Commentary and criticism are recognized public purposes in the preamble to section 107. Although the artistic nature of the work may weigh against fair use (the law may be more likely to favor the fair use of factual works), the noncommercial use of a limited amount of a sound recording favors fair use. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) ("The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy."); *Dr. Seuss Enters. L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997) ("Creative works are 'closer to the core of intended copyright protection' than informational and functional works . . ."). But see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (which found 2 Live Crew's parody of "Oh, Pretty Woman" to be fair use). The impact on the market for the copyrighted work may even be favorable if visitors to the site are motivated to purchase the entire album.

141. *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 349 (1991) (quoting U.S. CONST. art. I, § 8, cl. 8).

equipped with devices that limited the number of copies that could be made, or that permitted copies to be made only from a CD, musicians who are now eschewing the traditional recording industry and distributing their music themselves on the Internet may find it difficult to exercise their own reproduction, distribution, and public performance rights. Furthermore, not every digital recording is necessarily copyrighted. Federal government-produced materials, for instance, automatically belong in the public domain.<sup>142</sup> Thus under the scenario described above, it would be difficult to disseminate a digital recording of the President's State of the Union Address, even though the recording of that work would almost certainly be in the public domain. Even copyrighted digital recordings will eventually enter the public domain as their term of protection expires.

Lastly, there is a growing movement on behalf of the "copyleft" ideal—the complete antithesis of copyright—which advocates placing and keeping new works—such as software—permanently in the public domain.<sup>143</sup> Copyleft refers to a quasi-license agreement that certain works on the Internet are intended by their authors to be freely copied, distributed, performed, derived from, or displayed by anyone free of charge, no permission necessary, with only the requirement that the work and any subsequent copies or derivative works continue to be "copylefted," so that no-one ever "owns" any rights to it.<sup>144</sup> This could be the ethos behind many small-scale recording artists who are currently using MP3 files to freely distribute their music on the Internet, desiring only that they reach an audience.

Thus a key issue for Congress is whether the security devices contemplated by the DMCA will be amenable to accessing works in the public domain, regardless of how they enter the public domain, or, whether due to the recording industry's desire to prevent infringement, non-infringing uses will be prevented too. The Supreme Court has looked disfavorably on efforts to combat infringement that interfere with the public's ability to make non-infringing uses of materials. In denying Universal the ban it sought on Betamax video recorders, Justice Stevens commented that "an injunction which seeks to deprive the public of the very tool or article of commerce capable of some non-infringing use would be an extremely harsh remedy, as well as unprecedented in copyright law."<sup>145</sup>

There are also significant dangers of overreaching with respect to the fair use of copyrighted recordings. The DMCA encourages a vision of the future digital environment in which copyrighted materials are promulgated with technological

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142. See 17 U.S.C. § 105 (1994).

143. Not surprisingly, much discussion of "copyleft" is found on the Internet. Derived from the "open source" movement in software development and distribution, "copyleft" is introduced in *Open Source Software: A (New?) Development Methodology* (visited Nov. 17, 1998) <<http://www.opensource.org/halloween1.html>>.

144. This "copyleft" licensing scheme is summarized in Wired Magazine's web site: <<http://www.wired.com/wired/5.08/linux.html>>.

145. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 444 (1984) (citation omitted).

"locks" that limit their ability to be accessed, reproduced, and circulated without first being assessed a charge, creating in effect a "pay-per-view" Web.<sup>146</sup> Congress, expressing its best intentions, made it clear that the circumvention provision does not apply to nonprofit libraries, archives, educational institutions, and charitable and other tax-exempt institutions.<sup>147</sup> The DMCA also stipulated that it would have no effect on the law of fair use.<sup>148</sup> Thus certain copyrighted works may also be required to contain some sort of "key" that will facilitate the circumvention of their protection devices.

Unfortunately, this may result in a very narrow, regulated future for fair use. While it may be conceivable to authorize such "keys" to libraries, educational institutions, and other organizations who routinely make fair use of copyrighted works, the fair use privilege does not belong solely to these institutions.<sup>149</sup> As the language of the statute and the development of the case law demonstrates, the finding of fair use is based on *conduct*—that is, the "use" of the copyrighted work and the effects of that use, and *not* on the *status* of the user, that is, on whether the user is a librarian, a professor, scholar, or journalist.<sup>150</sup> Anyone may be in the position to make a fair use of a copyrighted work for a variety of legitimate purposes, including scholarship, commentary, parody, and even the more mundane temporary copying for later use or the copying for home use of lawfully acquired materials.<sup>151</sup> If the general public is going to be able to continue to make fair use of copyrighted works in Congress's locked-down vision of the Internet, then either everyone is going to be provided a "key" (thereby defeating the purpose of the locks in the first place), or "keys" will have to be distributed in advance for each purported fair use in an oppressive regulatory framework. Unfortunately, savvy members of the online community may respond to excessive regulation by attempting to hack around protection devices, exposing themselves not only to the risk of a suit for infringement but for criminal prosecution as well.<sup>152</sup>

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146. See *A Pay-Per-View World*, WASH. POST, Aug. 4, 1998, at A14 (discussed in 144 CONG. REC. H7094) (statement of Rep. Bliley).

147. See 17 U.S.C.A. § 1201(d)(1) (West Supp. 1999).

148. See *id.* § 1201(c)(i).

149. Not to mention that the very idea of "authorizing" fair use by such institutions before the fact brings to mind troubling images of fair use being narrowly defined.

150. The diversity of those found to have made permissible fair use of copyrighted materials includes the rap group 2 Live Crew's parody of Roy Orbison's "Oh, Pretty Woman." See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

151. Certain home copying was recognized as legitimate fair use in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); home taping for noncommercial use is permitted in the Audio Home Recording Act. See 17 U.S.C. § 1002 (1994).

152. Congress, made sensitive to the importance of fair use from lobbying by libraries, universities, and other interested parties, convened a Conference on Fair Use (CONFU) to address these concerns and to begin to develop guidelines for librarians. Ultimately the CONFU could not reach a consensus on the guidelines, reporting that it was "premature to draft guidelines for digital transmissions of digital documents." 144 CONG. REC. at H7096-7097 (statement of Rep. Boucher).

To summarize, the Digital Millennium Copyright Act encourages music publishers and record companies to control the access and circulation of their works, which could cut off not only infringing uses but also lawful fair use.<sup>153</sup> This, along with the imposition of a more expansive regime of statutory licenses, will make the Internet increasingly a pay-per-use marketplace rather than an open forum for the free flow and exchange of information. However, by providing for fair use, as supported by language in the Constitution, the Copyright Act has recognized that there are circumstances in which the goals enumerated in the Constitution, that are served by copyrights (that is, promoting progress), are better served by allowing the use of copyrighted works, rather than prohibiting such use.<sup>154</sup> Congress should spend the time before the DMCA goes into effect carefully reconsidering the impact of the Act on fair use as understood in its broadest (and truest) sense and taking action to ameliorate the potential damage to the best aspects of the Internet. Until then, the music industry will be developing technological measures to contain MP3 music piracy.

#### STRANGE BREW: A CONCLUSION

MP3 files are at the forefront of a revolution in the reproduction and distribution of popular music:

[r]ecord companies and music publishers are confronted with a consuming public that can literally manufacture its own albums based on material that is beamed into households from remote sources, and can enjoy these albums with a sound quality that is equal to, or higher than,

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Besides the fact that the CONFU was given a narrow charge that did not consider fair use outside an educational and institutional context, any guidelines on fair use would be of limited use to libraries and other academics anyway. Whether an otherwise infringing use of copyrighted materials constitutes lawful fair use is an extremely fact-sensitive determination that ultimately is best settled by looking at each situation on a case-by-case basis, rather than applying a static set of guidelines. Analysis on a case by case basis ensures both a more accurate assessment of fair use that is tailored to each use and the ability to adapt each assessment to the current state of the law. This approach was recently adopted by Indiana University in its policy on the use of copyrighted works for education research, on the advice of Professor Kenneth Crews, Director of the IUPUI Copyright Management Center. This approach is supported by the United States Supreme Court. Emphasizing the hard-to-pin-down nature of fair use, Justice Stevens in *Sony* remarked that fair use is not conducive to rigid rules or guidelines, but instead must be decided on a case by case basis. See *Sony*, 464 U.S. at 449.

153. The usefulness of the protection devices once the copyright term has expired is yet another question.

154. See *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1077 (2d Cir. 1992); see also *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1495 (Ga. 1984), cert. denied, 471 U.S. 1004, on remand, 618 F. Supp. 469 (1985) ("The 'fair use' doctrine allows a court to resolve tensions between the ends of copyright law, public enjoyment of creative works, and the means chosen under copyright law, the conferral of economic benefits upon creators of original works.").

that which is currently the standard.<sup>155</sup>

Nevertheless, users of MP3 files on the Internet must conscientiously attempt to comply with the Copyright Act. Some form of a license payment is necessary for most transmissions of digital recordings not made by the copyright owner or on the owner's behalf. Voluntary licenses for public performances can be negotiated with ASCAP and the other performance rights societies; mechanical licenses for reproductions and distributions can be paid to the Harry Fox Agency; and RIAA can negotiate on behalf of record companies. On the other hand, MP3 users should always remain open to exploring the scope of fair use of sound recordings for bona fide purposes that benefit the public.

For its part, the recording industry can develop sensitive methods to obtain all the royalties to which copyright owners are entitled, while at the same time not foreclosing non-infringing uses of MP3 technology. For example, ASCAP has recently begun using a software program called "EZ-Seeker" that searches out web sites that distribute music and automatically sends out a license form.<sup>156</sup> The RIAA is in the process of developing an industry-wide technical standard that would give the music industry control over the online distribution of music.<sup>157</sup> Entitled the Secure Digital Music Initiative (SDMI), the initiative is a coalition of representatives from the record industry and several technology companies organized to develop a system to limit music distribution, provide license and royalty payments, and secure online music from unauthorized copying.<sup>158</sup> While such a system may satisfy the RIAA, it is unclear, and probably doubtful, whether these companies have been concerned with fair use or access to works either in the public domain or not eligible for copyright protection.

Yet a workable model already exists: the Audio Home Recording Act compensates copyright owners for unlawful copying using DATs by providing them with royalty payments derived from sales of DAT recording devices and paid to them by manufacturers and importers of DAT equipment.<sup>159</sup> Similarly, a small surcharge could be added to the price of MP3 playback devices like the Rio, or even to blank CDs and floppy disks, with a share going to publishers and record companies. Although this would compensate copyright owners by raising the prices paid by consumers, the impact of the increase would be minimized since it would spread the cost across the public. Meanwhile, the MP3 files themselves would remain accessible for fair use, public domain use, and authorized copying.

Finally, the music industry may have to accept the revolution in music

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155. Howard Siegel, *Digital Distribution of Music: How Current Trends Affect Industry*, 5 MULTIMEDIA & WEB STRATEGIST, Oct. 1998 at 1, 3.

156. See *Multimedia Developments of Note*, 4 MULTIMEDIA & WEB STRATEGIST, Sept. 1998, at 1, 2.

157. See Dorney, *supra* note 121, at B7.

158. See *id.*

159. See PASSMAN, *supra* note 22, at 245-46.

distribution that MP3 files represent. Rather than trying to contain the proliferation of digital music on the information highway, record companies and music publishers should embrace and develop the new markets made possible by MP3 technology. For instance, the industry could learn from the way obscure, far-flung musicians have made names for themselves in localized online communities by distributing their recordings on MP3 sites. As one web site enthuses, “[a]rtists and labels can employ MP3 technology in the best way to suit their individual needs. Give away one song to sell a CD, distribute low quality versions of songs, sell individual songs for digital delivery, prepend an audio commercial to songs, there are limitless possibilities for artists to explore.”<sup>160</sup> Record companies could reproduce and distribute music in a similar fashion, reaching widely diverse audiences:

[D]igital distribution presents utopian possibilities. Freed of the costs of manufacturing and distributing CDs, digitally distributed music could be cheaper for consumers and more profitable for musicians. Music could be geared to more specialized audiences that may be small but widely scattered; a fan in Helsinki could download tunes from a band in Jakarta.<sup>161</sup>

As an example, Hollywood Records, a well-known handler of high-profile movie soundtracks, has adopted MP3 as its standard.<sup>162</sup>

In the meantime, Congress will struggle to develop a policy that both facilitates the technological protection of copyrights and preserves the law's traditional deference for fair use. Whatever policy emerges may be short lived. Congress, the music industry, and the online community are likely to discover well before the October 1, 2000 implementation of the DMCA that the MP3 format has become obsolete and a new format is looming on the horizon. To prevent perennial crises as new technologies emerge, Congress and the courts must learn to reconcile both the law to technology and the rights of copyright owners to the progressive goals found in the Constitution.

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160. Robertson, *supra* note 13.

161. Jon Pareles, *Internet Incites Revolution in Music Industry*, J. REC., July 17, 1998, available in 1998 WL 11955428.

162. See *Internet: Hollywood Records Embraces “Pirate” Standard MP3*, NETWORK WK., July 27, 1998, available in 1998 WL 16054305.

## APPENDIX: TABLE OF LICENCES

Rights	Record Companies (sound recordings)	Music Publishers (songs)
Reproduction	Voluntary License  (including digital phonorecord deliveries)	Compulsory License for reproductions in the form of recordings (mechanical licenses)  (Harry Fox Agency)  (including digital phonorecord deliveries)
Distribution	Voluntary License  (including digital phonorecord deliveries)	Compulsory License for distributions of recordings  (Harry Fox Agency)
Public Performance	No license required/No performance right  (Except for certain digital transmissions*)	Voluntary License  (ASCAP/BMI/SESAC)
Derivative Works	Voluntary License	Voluntary License

**Voluntary License:** the copyright owner may voluntarily grant the license. The effect is that the use cannot be made without the owner's permission and without paying a negotiated license fee.

**Compulsory License:** the copyright owner must grant a license. The effect is that the use may be made without the owner's permission as long as the license fee set by statute is paid.

**Digital Phonorecord Delivery:** a recording that is transmitted digitally with the intent that the receiver will be acquiring a fixed copy of the recording.

**\*criteria for Digital Audio Performances:**

There must be a transmission, that is digital, and audio only (not audio-visual). If the transmission is interactive: Voluntary License.

If the transmission is non-interactive:

and through a subscription: Voluntary (Compulsory if "compliant").

and not through a subscription:

and is a "broadcast": no performance right, so no license is required.

and is an "eligible" non-broadcast: Compulsory License (DMCA).

# CLOSING THE DOORS ON UNSUPPORTED SPECULATION: JOINER'S EFFECT ON THE ADMISSIBILITY OF EXPERT TESTIMONY

THERESA M. MOORE\*

## INTRODUCTION

The critical debate over what types of scientific testimony and evidence should survive the scrutiny of the Federal Rules of Evidence continues to progress. Attorneys continuously search for guidance regarding the admission of expert testimony because admissibility decisions can be a pivotal point in determining the viability and/or outcome of a particular claim.<sup>1</sup> Due to the Supreme Court's goal to exclude "junk science,"<sup>2</sup> the Court has emphasized the importance of scientifically accurate (or reliable) expert evidence and testimony. In achieving this goal, however, the scope of a district court judge's authority to exclude a particular expert's testimony has never been clearly defined. In the meantime, courts continue to experience an influx of new scientific and non-scientific testimony. Therefore, it is critical that district court judges are given guidance to assist them in their determinations of admissibility.

Over five years ago, the Supreme Court created a new standard governing the admissibility of expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>3</sup> After defining the requirements for the admissibility of expert testimony, the Court set forth a directive addressing the scope of district court judicial authority. The Supreme Court specifically provided that the district court judge, when acting as the gatekeeper, must focus "solely on [the] principles and methodology [of the experts and], not on the conclusions they generate."<sup>4</sup> As a result of *Daubert*'s distinction between methods and conclusions, conflicting views developed as to the scope of a district court's power when determining the

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1. See Patrick C. Barry, *Admissibility of Scientific Evidence in the Remand of Daubert v. Merrell Dow Pharmaceuticals, Inc.: Questioning the Answers*, 2 WIDENER L. SYMP. J. 299, 305 (1997) (noting that evidence of causation now must be presented via expert testimony, and therefore, many suits can be precluded if the expert's opinion is speculatively based on existing data); Michael H. Gottesman, *From Barefoot to Daubert to Joiner: Triple Play or Double Error?*, 40 ARIZ. L. REV. 753, 769 (1998).

2. See *Graham v. Playtex Prods., Inc.*, 993 F. Supp. 127, 134 (N.D.N.Y. 1998) (stating that *Daubert*'s primary concern was the exclusion of "junk science"); Charles F. Preuss, *Closing the Door on Junk Science*, 65 DEF. COUNS. J. 323, 323 (1998) (illustrating how the appropriate standard of admissibility is important to ensure that courtrooms are not infiltrated with "junk science"); Richard B. Racine et al., *The Battle over Science in the Courtroom*, FED. LAW., Feb. 1995, at 36, 40; Jeffrey Robert White, *Experts and Judges*, TRIAL, Sept. 1998, at 91, 91.

3. 509 U.S. 579 (1993).

4. *Id.* at 595.

admissibility of an expert's testimony.<sup>5</sup> Some of the circuit courts gave great deference to the Supreme Court's direct limitation that a judge's focus should be on the reliability of an expert's methods and not on the expert's conclusions.<sup>6</sup> Other circuit courts gave less deference to the Supreme Court's distinction and allowed a "district [court] judge to evaluate both the scientific validity of the expert's methodology and the strength of the expert's conclusions."<sup>7</sup>

After many years of confusion, the Supreme Court revisited *Daubert* in *General Electric Co. v. Joiner*.<sup>8</sup> Although the Court's primary concern in *Joiner* was identifying the appropriate standard of review governing a district court's decision to admit or exclude expert testimony, the Court also provided insight into *Daubert*'s "methodology/conclusion" distinction.<sup>9</sup> While it is unclear whether *Joiner* conclusively extended the trial court judge's gatekeeping role to include an expert's conclusions,<sup>10</sup> the Supreme Court's opinion has resoundingly

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5. See J. Kennard Neal, *Life After Joiner, How Will the New Supreme Court Decision Affect the Admissibility of Expert Testimony in Georgia?*, 3 GA. B. J. 32, 34 (1998) (discussing the growing debate as to the scope of "the district court's gatekeeper role in evaluating the 'conclusions' of the proposed expert"); Anthony Z. Roisman, *The Courts, Daubert and Environmental Torts: Gatekeepers or Auditors?*, 14 PACE ENVT'L. L. REV. 545, 562 (1997) (stating that *Daubert*'s seemingly bright-line distinction between methodology and conclusions has not produced uniform results among the circuit courts); Ruth Saunders, *The Circuit Courts' Application of Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 46 DRAKE L. REV. 407, 422-23 (1997) (illustrating that post-*Daubert* circuit court opinions have led to two distinct interpretations of the Supreme Court's opinion).

6. See *infra* notes 52-53 and accompanying text; see also Kenneth J. Chesebro, *Taking Daubert's "Focus" Seriously: The Methodology/Conclusion Distinction*, 15 CARDOZO L. REV. 1745, 1746 (1994) (indicating that the persuasiveness of the expert's opinion is beyond the scope of an admissibility determination under Rule 702); Lawrence S. Pinsky, *The Use of Scientific Peer Review and Colloquia to Assist Judges in the Admissibility of Gatekeeping Mandated by Daubert*, 34 HOUS. L. REV. 527, 542 (1997) (stating that a judge's focus is limited to the validity of the expert's underlying methodology and not whether the expert's testimony or ultimate conclusion is correct); Saunders, *supra* note 5, at 422 (stating that circuit courts, supporting *Daubert*'s bright-line distinction, distinguished between the trial judge's initial role of determining whether to admit the proffered scientific testimony and the jury's role of deciding the "weight" of the expert's opinion).

7. Saunders, *supra* note 5, at 422 (intimating that the Ninth Circuit interpreted *Daubert*'s gatekeeping role broadly); see *infra* notes 72-101 and accompanying text.

8. 522 U.S. 136 (1997).

9. The Supreme Court granted certiorari "to determine what standard an appellate court should apply in reviewing a trial court's decision to admit or exclude expert testimony under *Daubert*." *Id.* at 138.

10. Some commentators believe that the combined effect of the *Daubert* and *Joiner* opinions allows a district court judge to exclude expert testimony if the judge is in disagreement with the expert's application of a reliable methodology in arriving at the proffered conclusion. See, e.g., Gottesman, *supra* note 1, at 772; Preuss, *supra* note 2, at 323. However, there are others who maintain that the *Joiner* decision should not be construed so broadly and that the Supreme Court's opinion did not extend the judge's gatekeeping role to include an expert's conclusions. See, e.g.,

impacted the admissibility of expert testimony.

This Note analyzes and summarizes the various standards governing the admissibility of expert testimony and provides a glimpse at *Joiner*'s effect on future decisions. Part I provides a historical background of expert testimony and describes the differing opinions on a district court judge's authority to analyze the validity or reliability of an expert's conclusion(s). Part II addresses the history of *Joiner* from the district court decision to the appeal to the Supreme Court. Part III suggests that the Supreme Court's decision in *Joiner* and the proposed amendments to Federal Rule of Evidence 702 represent a retreat from *Daubert*'s methodology/conclusion distinction. Finally, part IV discusses how the Court's decision signals a return to a more restrictive era governing expert testimony admissibility determinations under Federal Rule of Evidence 702.

## I. HISTORY OF EXPERT TESTIMONY

### A. *The Step Away from Requiring General Acceptance*

For more than seventy years, the admissibility of expert testimony was governed by the "general acceptance" test set forth in *Frye v. United States*.<sup>11</sup> Under *Frye*, a trial judge was required to exclude evidence based on scientific principles that had not gained general acceptance in that field.<sup>12</sup> The proponent of scientific evidence was required to demonstrate that (1) "the expert's conclusions represent[ed] an established view within the field" and that (2) "the expert's conclusions . . . [were] sufficiently accurate to be reliable."<sup>13</sup>

*Frye*'s "general acceptance" test was first called into question when the Federal Rules of Evidence ("FRE") were adopted in 1975.<sup>14</sup> Specifically, the *Frye* test conflicted with FRE 702, which provides "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."<sup>15</sup> Because Rule 702 did not require "that the offered evidence be generally accepted within the scientific community," this established a conflicting view as to the admissibility of expert testimony.<sup>16</sup> This discrepancy developed into a split among the circuit courts as to whether the *Frye* standard survived under the Federal Rules. In 1993, the Supreme Court

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Chesebro, *supra* note 6, at 1746; Pinsky, *supra* note 6, at 542.

11. 293 F. 1013, 1014 (D.C. Cir. 1923).

12. See *id.* at 1014.

13. Peter B. Oh, *Assessing Admissibility of Nonscientific Expert Evidence Under Federal Evidence Rule 702*, 64 DEF. COUNS. J. 556, 564 (1997).

14. See Russell D. Marlin, Note, 21 U. ARK. LITTLE ROCK L. REV. 133, 139 (1998).

15. FED. R. EVID. 702.

16. See Racine et al., *supra* note 2, at 38; see also Marlin, *supra* note 14, at 139 (indicating that "*Frye*'s replacement was not fully recognized until the court incorporated it into the *Daubert* standard in 1993.").

granted certiorari in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>17</sup> to (1) resolve the conflict between *Frye*'s restrictive approach and the more liberal approach promulgated in FRE 702 and (2) determine the proper standard for admitting scientific, expert testimony.<sup>18</sup>

### B. The *Daubert* Decision

The primary issue in *Daubert* was whether the plaintiffs' expert could testify as to epidemiological studies establishing the "causalational" link between the plaintiffs' birth defects and their pregnant mothers' use of the antinausea drug Bendectin. The defendant moved for summary judgment and offered a supporting affidavit of an expert stating that after his review of all Bendectin literature, he was unable to find a study indicating that use of the drug caused fetus malformations.<sup>19</sup> In opposition, the plaintiffs offered the testimony of eight experts claiming that the use of Bendectin could cause birth defects.<sup>20</sup> The plaintiffs' experts based their opinion on the use of animal studies and a "reanalysis of previously published epidemiological (human statistical) studies."<sup>21</sup> The district court applied *Frye*'s general acceptance test and excluded the plaintiffs' expert testimony. As a result, the plaintiffs were unable to sustain their burden of causation and the district court granted the defendant's motion for summary judgment.<sup>22</sup> The Ninth Circuit Court of Appeals also applied *Frye*'s general acceptance test and affirmed the district court's decision to exclude the expert testimony.<sup>23</sup>

The Supreme Court vacated the decision by the Ninth Circuit and unanimously concluded that *Frye*'s general acceptance test "was superseded by the adoption of the Federal Rules of Evidence."<sup>24</sup> The Supreme Court also determined that federal judges, as "gatekeepers,"<sup>25</sup> are to apply a two-step analysis under FRE Rules 104(a)<sup>26</sup> and 702 to determine any preliminary

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17. 506 U.S. 914 (1992) (mem.).

18. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 585 (1993).

19. See *id.* at 582.

20. See *id.* at 583.

21. *Id.* (citations omitted).

22. See *id.* at 583-84.

23. See *Daubert v. Merrell Dow Pharm., Inc.*, 951 F.2d 1128 (9th Cir. 1991).

24. *Daubert*, 509 U.S. at 587, 589. Specifically, Rule 702 governs the admissibility of expert testimony. See *id.* at 588.

25. *Id.* at 596. See Racine et al., *supra* note 2, at 39 (stating that a trial judge must act as a gatekeeper to "assess whether the reasoning or methodology underlying the testimony is scientifically valid and can be applied properly to the facts at issue").

26. FRE 104(a) states:

Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence, shall be determined by the court, subject to the provisions of subdivision (b) [discussing relevancy admissions conditioned of fact]. In making its determination it is not bound by the rules of

questions regarding the reliability and relevance of an expert's testimony.<sup>27</sup> The two-step analysis requires the trial judge to conduct an initial determination as to whether "the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."<sup>28</sup> Therefore, the combination of both prongs requires the judge to assess "whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue."<sup>29</sup>

*Daubert's* first prong ensures scientific reliability by requiring that the proffered testimony be based on scientific knowledge.<sup>30</sup> Basically, this reliability prong requires that the testimony be supported by valid, scientific methods and procedures.<sup>31</sup> The testimony's reliability is determined by applying *Daubert's* non-exclusive list of factors which include: (1) whether the expert's theory or technique "can be (and has been) tested[,]"<sup>32</sup> (2) "whether the theory or technique has been subjected to peer review and publication[,]"<sup>33</sup> (3) "the known or potential rate of error,"<sup>34</sup> and (4) whether the technique is generally accepted in the scientific community.<sup>35</sup> *Daubert's* second prong, in contrast, confirms the relevance or "fitness" of the proffered testimony by requiring "that the evidence or testimony assist the trier of fact to understand the evidence or to determine a fact in issue."<sup>36</sup> Therefore, the goal is to keep unreliable or irrelevant evidence

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evidence except those with respect to privileges.

FED. R. EVID. 104(a).

27. See *Daubert*, 509 U.S. at 589; see also FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 45-46 (1994) [hereinafter REFERENCE MANUAL].

28. *Daubert*, 509 U.S. at 592.

29. *Id.* at 592-93; see also Jonathan R. Schofield, Note, *A Misapplication of Daubert: Compton v. Subaru of America Opens the Gate for Unreliable and Irrelevant Expert Testimony*, 1997 BYU L. REV. at 489, 493.

30. See *Daubert*, 509 U.S. at 590. Scientific knowledge requires that the testimony is grounded "in the methods and procedures of science" and "connotes more than subjective belief or unsupported speculation." *Id.* Under this standard, scientific knowledge is described as "an inference or assertion [that is] derived by the scientific method" and is "supported by appropriate validation—i.e., 'good grounds,' based on what is known." *Id.* See also Shelly Storer, Note, *The Weight Versus Admissibility Dilemma: Daubert's Applicability to a Method or Procedure in a Particular Case*, 1998 U. ILL. L. REV. 231, 235.

31. See Kurtis B. Reeg & Cawood K. Bebout, *What's It All About, Daubert?*, 55 J. MO. BAR 369, 369 (1997) (indicating that "a valid scientific connection to the pertinent inquiry" is a precondition to Rule 702 admissibility) (quoting *Daubert*, 509 U.S. at 592); Saunders, *supra* note 5, at 410 (stating that *Daubert's* first prong "focuses on the determination of whether the reasoning or methodology applied by the expert is scientifically valid").

32. *Daubert*, 509 U.S. at 593.

33. *Id.*

34. *Id.* at 594.

35. See *id.*

36. *Id.* at 591 (citations omitted).

from the jury's purview.<sup>37</sup>

In applying both *Daubert* prongs, the Court emphasized that under FRE 702, a district court judge's inquiry should be flexible and that the judge should focus on the expert's underlying methodology and *not the conclusion* generated.<sup>38</sup> The Court also noted that any concerns of admitting ill-founded conclusions are safeguarded by vigorous cross-examination, presentation of contrary evidence, and careful instructions on burden of proof.<sup>39</sup> According to the Court, the Federal Rules of Civil Procedure ("FRCP") also provide further protections against the admission of ill-founded conclusions.<sup>40</sup> Irrespective of whether an expert's testimony satisfies the requirements of FRE 702, the district court judge may conclude that the evidence is insufficient to maintain the plaintiff's burden to persuade a "reasonable juror to conclude that the position more likely than not is true."<sup>41</sup> In such an event, the judge remains free to direct a judgment under FRCP 50(a) or to grant summary judgment under FRCP 56.<sup>42</sup>

The Court viewed the use of these procedural devices as a sufficient safeguard and a more appropriate resolution than the wholesale exclusion of expert testimony under *Frye*'s general acceptance test.<sup>43</sup> The Court recognized that its flexible approach may still "prevent the jury from learning of authentic insights and innovations."<sup>44</sup> However, the Court noted that the balance should always be struck in favor of admitting the proffered testimony.<sup>45</sup>

In the wake of *Daubert*, many articles were written assessing the Supreme Court's effect on the admissibility of expert testimony. The articles discussed the challenging responsibilities imposed upon district court judges to act as a gatekeepers and to assess the validity of scientific expert testimony. Many believed that the *Daubert* decision required district court judges to become "amateur scientists" in order to make admissibility determinations on complex scientific evidence and testimony.<sup>46</sup> One commentator even opined that

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37. See REFERENCE MANUAL, *supra* note 27, at 46.

38. See *Daubert*, 509 U.S. at 594-95.

39. See *id.* at 596.

40. See *id.*

[I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, Fed. Rule Civ. Proc. 50(a), and likewise to grant a summary judgment. Fed. Rule Civ. Proc. 56.

*Id.*

41. *Id.*

42. See *id.*

43. See *id.*; see also Saunders, *supra* note 5, at 413-14 (discussing concerns over abandoning *Frye*'s more stringent approach for *Daubert*'s flexible approach).

44. *Daubert*, 509 U.S. at 596-97.

45. See *id.*; Saunders, *supra* note 5, at 414.

46. See, e.g., John M. Conley & David W. Peterson, *The Science of Gatekeeping: The Federal Judicial Center's New Reference Manual on Scientific Evidence*, 74 N.C. L. REV. 1183, 1186 (1996) (discussing the urgent need for the publication of the Federal Judicial Center's science

*Daubert's* gatekeeping requirement sparked more questions than it answered.<sup>47</sup>

### C. Confusion After *Daubert*

Even though the *Daubert* ruling clarified several issues regarding the admissibility of expert testimony, the Court's decision prompted the development of new uncertainties. One of the burgeoning issues was whether a district court could exclude expert testimony that was based upon reliable methodology merely because the court did not agree with the reliability of the expert's conclusion.<sup>48</sup> The circuit courts responded differently to this issue, and as a result, a circuit court split developed.<sup>49</sup> The courts' disparate rulings resulted from attempts to balance *Daubert's* two-prong requirements of reliability and relevance (i.e., "fitness") against *Daubert's* methodology/conclusion distinction limiting the district court judge's scope of admissibility determinations.<sup>50</sup> The circuit courts' attempts to balance these competing requirements resulted in two different approaches for determining at what point a district court judge's gatekeeping role ends and the jury's role (as factfinder) begins.

1. *Weight-of-the-Evidence Approach*.—The first approach, the "weight-of-the-evidence approach," applies a strict interpretation of *Daubert* that distinguishes "between the initial role of the trial judge in determining the admissibility of scientific expert testimony and the weight the jury is to give that testimony—the methodology/conclusion distinction."<sup>51</sup> Circuit courts employing this approach believed that if a proponent established the expert's reliance on a standard scientific methodology, the trial judge had no inherent or implicit authority to exclude the expert's testimony, no matter how absurd the conclusion.<sup>52</sup> These courts allowed the jury (not the judge) to analyze the

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manual to assist judges).

47. See Racine et al., *supra* note 2, at 38.

48. See Conley & Peterson, *supra* note 46, at 1198; see also Pinsky, *supra* note 6, at 542 (indicating confusion as to whether an expert's conclusions were beyond the purview of the trial judge's determination of admissibility). The Supreme Court in *Daubert* failed to clarify the extent of a district court judge's authority to review the expert's application of a scientific technique or methodology. See Storer, *supra* note 30, at 236.

49. See Roisman, *supra* note 5, at 562 (stating that *Daubert's* bright-line distinction did not yield uniform results among the circuit courts); Saunders, *supra* note 5, at 423 (opining that the circuit courts have adopted two distinct readings as to the scope of a district court judge's gatekeeping role under *Daubert*).

50. See Storer, *supra* note 30, at 246.

51. Saunders, *supra* note 5, at 422.

52. See *United States v. Bonds*, 12 F.3d 540, 556 (6th Cir. 1993) (holding that "the *Daubert* Court has instructed the courts that they are not to be concerned with the reliability of the conclusions generated by valid methods, principles and reasoning. Rather, they are only to determine whether the principles and methodology underlying the testimony itself are valid."); *Christopherson v. Allied-Signal Corp.*, 939 F.2d 1106, 1111 (5th Cir. 1991) (en banc), *cert. denied*, 503 U.S. 912 (1992) (stating that the focus should be on the expert's methodology and not the

expert's application of a "reliable" methodology to the facts at hand.<sup>53</sup> Under the weight-of-the-evidence approach, the judge's role is to determine whether or not an expert's opinion is based on more than mere conjecture; the jury's role is to determine whether an expert's testimony is credible.<sup>54</sup> Circuit courts exercising this approach give credence to the adversarial system's use of cross-examination, presentation of evidence, well-crafted jury instructions,<sup>55</sup> and *Daubert*'s differentiation between methodology and conclusions.

*Daubert*'s bright-line distinction was viewed as a necessary dividing line and limitation upon the judge's authority.<sup>56</sup> Without *Daubert*'s delineation between methods and conclusions, a district court judge could consider the expert's ultimate conclusion in making her determination of admissibility and, as a result, the judge would inappropriately encroach upon the jury's role.<sup>57</sup> Therefore, some commentators argue that a more expansive approach of determining admissibility inappropriately extends a district court judge's role as gatekeeper because nothing in the Supreme Court's opinion in *Daubert* requires or mandates that the judge determine whether the expert's conclusions are right or wrong.<sup>58</sup>

Circuit courts applying the weight-of-the-evidence approach, such as the District of Columbia, illustrate the concerns surrounding a more expansive gatekeeping role and the importance of *Daubert*'s methodology/conclusion

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conclusions); *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1433 (5th Cir. 1989) (providing that as long as an expert's methodology is well-founded, the nature of the expert's conclusion is irrelevant to admissibility, even if it is controversial or unique). "[A]n opinion must be admitted once an expert demonstrates reliance on a standard scientific methodology; otherwise, the court would be second-guessing the expert's conclusion contrary to *Daubert*." REFERENCE MANUAL, *supra* note 27, at 77. See also *Conley & Peterson*, *supra* note 46, at 1195 (indicating that *Daubert* implies that even if an expert's conclusions are absurd, the judge has no authority to exclude the testimony if the expert uses a reliable scientific method); *Pinsky*, *supra* note 6, at 542 (stating that a judge's focus is limited to the validity of the expert's underlying methodology and not whether the expert's testimony or ultimate conclusion is correct).

53. See *United States v. Chischilly*, 30 F.3d 1144, 1152-54 (9th Cir. 1994) (holding that the DNA expert's application of DNA profiling procedures was a question of weight to be determined by the jury), *cert. denied*, 513 U.S. 1132 (1995). Once Rule 702 has been met in regard to the scientific method in the abstract, the scientific testimony will go to the finder of fact, unless the judge determines that other Federal Rules of Evidence preclude the jury from considering the testimony. See *Storer*, *supra* note 30, at 240.

54. See *Roisman*, *supra* note 5, at 550.

55. See *Storer*, *supra* note 30, at 238.

56. See *Chesebro*, *supra* note 6, at 1753 (stating that the *Daubert* decision was made in vain unless a district court judge's focus remains on the expert's procedures and methodologies).

57. See *Saunders*, *supra* note 5, at 418.

58. The Supreme Court did not "articulate any legal rationale for why the conclusion reached by an expert bears on the Rule 702 admissibility inquiry, as long as the expert is using a proper methodology." *Chesebro*, *supra* note 6, at 1750. In fact, the *Daubert* opinion "demonstrates that even the most fervent disagreements with an expert's conclusion are irrelevant under Rule 702." *Id.* at 1751. See *Conley & Peterson*, *supra* note 46, at 1198-99.

distinction. In *Ambrosini v. Labarraque*,<sup>59</sup> a pregnant mother's use of the drugs Bendectin and Depo-Provera was alleged to cause birth defects. The defendants, the mother's physician and the drug manufacturer, moved for summary judgment, alleging that the plaintiffs were unable to prove that the birth defects were caused by the mother's use of the drug.<sup>60</sup> The district court agreed and granted the motion.<sup>61</sup>

The district court's decision was reversed on appeal<sup>62</sup> because the district court failed "to distinguish between the threshold question of admissibility and the persuasive weight to be assigned the expert evidence. . . ."<sup>63</sup> The appeals court noted that *Daubert*'s relevance prong requires an expert's proffered testimony to exceed subjective belief or unsupported speculation.<sup>64</sup> However, the court stated that:

[T]here is nothing in *Daubert* to suggest that judges become scientific experts, much less evaluators of the persuasiveness of an expert's conclusion. Rather, once an expert has explained his or her methodology, and has withstood cross-examination or evidence suggesting that the methodology is not derived from the scientific method, the expert's testimony, so long as it "fits" an issue in the case, is admissible under Rule 702 for the trier of fact to weigh.<sup>65</sup>

Consequently, the appeals court disagreed with the district court's decision excluding plaintiffs' expert testimony. The appeals court reasoned that *Daubert* did not require the exclusion of the expert's underlying evidence nor the expert's ultimate conclusion merely because the judge disagreed with studies indicating the lack of a causal link between the drug and the resulting birth defects.<sup>66</sup>

The appeals court further found that the expert's inability to reference an existing epidemiological study supporting his conclusion was not fatal to the issue of admissibility. In fact, the appeals court admitted the expert testimony because the expert was able to explain that he considered all of the available data and utilized traditionally accepted methods to reach his conclusion that Depo-Provera could cause the plaintiff's type of birth defects.<sup>67</sup> In support of this

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59. 101 F.3d 129 (D.C. Cir. 1996).

60. *See id.* at 131.

61. *See id.*

62. *See id.* at 141.

63. *Id.* at 131. With respect to *Daubert*'s reliability prong, the court noted *Daubert*'s instruction that a district court's focus should be limited to the methodology and principles of the plaintiff's expert and not on the ultimate conclusions rendered. *See id.* at 133.

64. *See id.* "Under the first prong of the analysis, the district court's focus is on the methodology or reasoning employed. Scientific implies a grounding in the methods and procedures of science and knowledge connotes more than subjective belief or unsupported speculation." *Id.* (internal quotes omitted) (quoting *Daubert*, 509 U.S. at 590).

65. *Id.* at 134.

66. *See id.* at 136.

67. *See id.* at 137.

decision, the appeals court stated that “when experts are ‘concededly well qualified in their fields,’ the fact that a case may be the first of its type, or that the plaintiff’s doctors may have been the first alert enough to recognize a causal connection, should not preclude admissibility of the experts’ testimony.”<sup>68</sup>

Thus, in balancing *Daubert*’s requirements of reliability and relevance (i.e., “fitness”) against *Daubert*’s methodology/conclusion distinction, the *Ambrosini* court favored the latter of the two requirements in order to support the admission of novel scientific evidence. As a result of the circuit court’s reasoning and approach to *Daubert*’s requirements for admitting expert testimony, the *Ambrosini* decision became one of the primary examples of maintaining *Daubert*’s bright-line distinction under the weight-of-the-evidence approach.

2. *Admissibility Approach*.—The second approach is termed the “admissibility approach.”<sup>69</sup> This approach places more emphasis on *Daubert*’s “fitness” requirement and interprets *Daubert* as giving trial judges a more active gatekeeping role that “enables the district judge to evaluate both the scientific validity of the expert’s methodology and the strength of the expert’s conclusions.”<sup>70</sup> Decisions by the Third and Ninth Circuits illustrate this approach and, accordingly, do not share the Supreme Court’s praise of ensuring reliable expert testimony through cross-examination of experts.<sup>71</sup> Furthermore, these circuit courts began to question whether there was truly a dividing line between an expert’s methods and ultimate conclusions.<sup>72</sup>

One of the first circuit court opinions questioning the limitations of *Daubert*’s methodology/conclusion distinction was *In re Paoli Railroad Yard PCB Litigation*.<sup>73</sup> The *Paoli* case was instituted by thirty-eight plaintiffs who sought damages related to polychlorinated biphenyls (“PCBs”), which leaked out of transformers at a railroad yard and into the groundwater of several nearby residences.<sup>74</sup> Some plaintiffs sought recovery for physical injuries allegedly caused by their exposure to PCBs.<sup>75</sup> Others sought damages for emotional distress related to their fear of future injury or for a decrease in their property values.<sup>76</sup> Defendants filed a motion in limine to exclude the plaintiffs’ expert testimony and the underlying evidence purporting to show the harmful effects of PCBs. The district court excluded all the testimony and underlying evidence

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68. *Id.* at 138 (citations omitted).

69. Storer, *supra* note 30, at 242.

70. Saunders, *supra* note 5, at 422.

71. The Supreme Court viewed the concerns of a potential influx of “junk science” into the courtrooms as an overly pessimistic view about the capabilities of the jury and the adversary system. See Racine et al., *supra* note 2, at 40.

72. See Neal, *supra* note 5, at 34.

73. 35 F.3d 717 (3d Cir. 1994); see also Saunders, *supra* note 5, at 417 (stating that “[t]he Third Circuit has taken a leading role in evaluating the admissibility of scientific expert testimony since 1985.”).

74. See *In Re Paoli Railroad Yard PCB Litigation*, 35 F.3d at 734-35.

75. See *id.* at 732, 735.

76. See *id.*

relied upon by the plaintiffs' experts.<sup>77</sup> Because the plaintiffs were unable to sustain their burden with respect to causation due to the lack of admissible expert testimony, the court granted the defendants' motion for summary judgment.<sup>78</sup>

The plaintiffs appealed the decision and contended that the district court's admissibility determination "usurped the role of the jury."<sup>79</sup> The Third Circuit Court of Appeals affirmed the district court's decision to exclude the testimony of several causation experts because the experts failed to proffer any justification for their conclusions with respect to plaintiffs that they did not physically examine.<sup>80</sup> In analytical support of the court's expert testimony admissibility determination, the circuit court disagreed with *Daubert*'s methodology/conclusion distinction and specifically stated that it has "only limited practical import."<sup>81</sup> Nevertheless, the court acknowledged that *Daubert*'s "methodology/conclusion distinction remains of some import"<sup>82</sup> when a party contends that an expert's testimony is unreliable only because it differs from the opinions of that party's own experts.<sup>83</sup>

The court provided that when a judge is determining the admissibility of scientific evidence or testimony, the judge may not "exclude evidence simply because he or she thinks that there is a flaw in the expert's investigative process which renders the expert's conclusions incorrect. The judge should only exclude the evidence if the flaw is large enough that the expert lacks 'good grounds' for his or her conclusions."<sup>84</sup> The court reasoned that:

When a judge disagrees with the conclusions of an expert, it will generally be because he or she thinks that there is a mistake at some step in the investigative or reasoning process of that expert. If the judge thinks that the conclusions of some other expert are correct, it will likely be because the judge thinks that the methodology and reasoning process of the other expert are superior to those of the first expert. This is especially true given that the expert's view that a particular conclusion "fits" a particular case must itself constitute scientific knowledge—a challenge to "fit" is very close to a challenge to the expert's ultimate conclusion about the particular case, and yet it is a part of the judge's admissibility calculus under *Daubert*.<sup>85</sup>

Thus, in balancing *Daubert*'s requirements of reliability and relevance (i.e., "fitness") against *Daubert*'s methodology/conclusion distinction, the *Paoli* decision illustrates that a district court judge must ensure that proffered expert

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77. See *id.* at 736.

78. See *id.*

79. *Id.* at 743.

80. See *id.* at 733-34.

81. *Id.* at 746.

82. *Id.* at 746 n.15.

83. See *id.* at 746.

84. *Id.*

85. *Id.* (emphasis added).

testimony is relevant to, or “fits,” the facts of the case. The opinion also demonstrates that a judge’s admissibility determination cannot be impeded by “classifications” prohibiting review of the fitness of the proffered expert’s testimony.<sup>86</sup> Consequently, the Third Circuit’s opinion in *Paoli* became one of the primary cases illustrating a departure from *Daubert*’s bright-line distinction.

Interestingly enough, the Ninth Circuit’s opinion on remand in *Daubert II*<sup>87</sup> also played a role in courts finding the line between methods and conclusions to be less distinct. Specifically, the *Daubert II* decision increased the confusion surrounding the extent to which a district court can evaluate an expert’s conclusions.<sup>88</sup> In addressing *Daubert*’s first prong of reliability, the *Daubert II* court recognized that expert testimony must reflect scientific knowledge, be a product of scientific method, and amount to “good science.”<sup>89</sup> The *Daubert II* court determined the reliability of the plaintiffs’ expert testimony by applying two out of the four Supreme Court factors: (1) “whether the theory or technique employed by the expert is generally accepted in the scientific community” and (2) “whether it’s been subjected to peer review and publication.”<sup>90</sup> In addition, the court considered “whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.”<sup>91</sup>

After applying these factors, the *Daubert II* court concluded that the plaintiffs’ expert scientists studied the effects of Bendectin only after being hired for the purposes of providing litigation testimony and that their conclusions were not based on any preexisting research.<sup>92</sup> The court provided that in order for the plaintiffs to prove that the proffered expert testimony was founded on “scientifically valid principles”:<sup>93</sup>

[T]he [plaintiffs’] experts must explain precisely how they went about reaching their conclusions and point to some objective source—a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like—to show that they

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86. *See id.*

87. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311 (9th Cir. 1995).

88. The Ninth Circuit’s analysis “raised what may be the most difficult question left unresolved by *Daubert*: the extent to which a trial court can evaluate an expert’s conclusions in ruling on admissibility.” Conley & Peterson, *supra* note 46, at 1198.

89. *Daubert*, 43 F.3d at 1315.

90. *Id.* at 1316. The remaining two factors the Supreme Court mentioned were deemed difficult or impossible to apply to the expert testimony proffered in this case because the same experts were responsible for the original research on Bendectin, but were unable to explain the nature of the research or what type of methodology they used. *See id.* at n.4.

91. *Id.* at 1317.

92. *See id.* at 1318-19 (noting that the plaintiffs made no showing that their expert’s testimony stemmed from pre-litigation research).

93. *Id.* at 1318.

have followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in their field.<sup>94</sup>

After reviewing the plaintiffs' supporting evidence, the *Daubert II* court concluded that the plaintiffs failed to satisfy their burden because the experts' opinions were never published in a scientific journal or subjected to the scrutiny of colleagues.<sup>95</sup> Furthermore, the experts were unable to explain a reliable methodology supporting their use of animal studies, chemical analyses, and epidemiological data to formulate their ultimate conclusions regarding this matter.<sup>96</sup> Hence, the experts could not explain their conclusion that Bendectin caused the plaintiffs' injuries in the absence of an authority for extrapolating human causation from animal studies.<sup>97</sup> The court reasoned that "something doesn't become 'scientific knowledge' just because it's uttered by a scientist; nor can an expert's self-serving assertion that his conclusions were 'derived by the scientific method' be deemed conclusive. . . ."<sup>98</sup> Therefore, the *Daubert II* court held that the plaintiffs' expert testimony failed to satisfy *Daubert's* reliability prong.

The *Daubert II* court also held that the expert testimony failed *Daubert's* fitness prong because the plaintiffs were unable to prove by a preponderance of the evidence that the ingestion of Bendectin by their mothers doubled the likelihood of their birth defects.<sup>99</sup> Specifically, the plaintiffs' experts could not reference epidemiological studies indicating that a mother's ingestion of Bendectin during pregnancy would double the risk of birth defects.<sup>100</sup> Because the statistical relationships between Bendectin and birth defects did not prove the relative risk to be greater than two, the court reasoned that the expert's testimony would be unhelpful and confusing to the jury.<sup>101</sup> Consequently, the testimony failed the Supreme Court's "fitness" prong, and the *Daubert II* court upheld the trial court's exclusion of the plaintiffs' expert testimony on Bendectin.<sup>102</sup>

Thus, after balancing *Daubert's* two-prong requirements of reliability and "fitness" against *Daubert's* methodology/conclusion distinction, the *Daubert II* court elected to give more weight to the "fitness" requirement than the Supreme Court's bright-line directive. The Ninth Circuit's reasoning illustrates that a judge making an admissibility determination must ensure that the expert's conclusion is relevant to the facts of the case. As a result, the *Daubert II* decision became an additional example of the admissibility approach to expert

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94. *Id.* at 1319.

95. *See id.* at 1318.

96. *See id.* at 1319.

97. *See id.* at 1319-20.

98. *Id.* at 1315-16 (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590, 592 (1993)).

99. *See id.* at 1320.

100. *See id.*

101. *See id.* at 1321.

102. *See* Neal, *supra* note 5, at 34.

testimony.

3. *Which Approach Is Correct?*—The preceding cases illustrate the conflict among circuit courts regarding *Daubert's* bright-line distinction between conclusions and methodology. Under the weight-of-the-evidence approach, the district court judge admits expert conclusions premised on the support of available data derived from reliable methodology. In contrast, under the admissibility approach, the district court judge will prohibit admission of expert conclusions when the testimony fails to satisfy FRE 702's "fitness" requirement—i.e., the gap between the underlying evidence and ultimate conclusion is too large. The potential consequences of the differing approaches were viewed by some commentators as leading to extremes of either cursory or overly stringent review of an expert's testimony.<sup>103</sup> Accordingly, the appropriate balance between the competing requirements of FRE 702 and *Daubert's* methodology/conclusion distinction became a crucial point of interest requiring direction by the Supreme Court.<sup>104</sup> The need for the Supreme Court to clarify the scope of the district court's gatekeeping function became evident when the Court granted certiorari in *General Electric Co. v. Joiner*.<sup>105</sup>

## II. GENERAL ELECTRIC CO. V. JOINER

### A. Procedural History and Factual Background

Since 1973, the plaintiff (Joiner) had come into contact with dielectric fluids in the city's electrical transformers through his employment as an electrician for the Water & Light Department in Thomasville, Georgia.<sup>106</sup> Early dielectric fluids were flammable and made out of a petroleum-based mineral oil. To correct this problem, polychlorinated biphenyls ("PCBs") were used to make the dielectric fluid non-flammable, but in 1978, Congress banned the future production and sale of PCBs because they were viewed as an "unreasonable risk of injury to

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[S]ome jurisdictions may subsume Rule 702's fitness requirement within the validity inquiry required under the first prong of Rule 702. In contrast, an overly rigorous application of the fitness test may result in a challenge to the expert's conclusions regarding external validity, contrary to *Daubert's* admonition that Rule 702's focus "must be solely on principles and methodology, not on the conclusions they generate."

Erin K.L. Mahaney, *Assessing the Fitness of Novel Scientific Evidence in the Post-Daubert Era: Pesticide Exposure Cases as a Paradigm for Determining Admissibility*, 26 ENVTL. L. 1161, 1185 (1996) (citations omitted) (reviewing post-*Daubert* application of Rule 702's fitness test and arguing that use of Rule 702's fitness requirement provides a valid tool in the judge's gatekeeping function).

104. "The sixty-four dollar question after *Daubert* was whether the weight-of-the-evidence approach is a 'scientifically valid' methodology for determining the issue of causation in torts cases." Gottesman, *supra* note 1, at 771.

105. 520 U.S. 1114 (1997) (mem.).

106. *General Elec. Co. v. Joiner*, 522 U.S. 136, 139 (1997).

health or the environment.”<sup>107</sup> In 1983, the city discovered that PCBs had contaminated the fluid in approximately 2668 of the city’s transformers, which allegedly used mineral oil-based dielectric fluid.<sup>108</sup>

Eight years after the discovery of PCBs, Joiner was diagnosed with small-cell lung cancer. The plaintiffs (Joiner and his wife) brought strict liability and negligence claims against the manufacturers of the transformers and dielectric fluids, alleging that Joiner’s exposure to PCBs and its derivatives, polychlorinated dibenzofurans (“furans”) and polychlorinated dibenzodioxins (“dioxins”), promoted or accelerated the onset of his cancer.<sup>109</sup> The plaintiffs admitted that Joiner had smoked cigarettes for eight years, his parents smoked, and his family had a history of lung cancer.<sup>110</sup> However, Joiner claimed that his cancer would not have developed for many years, if at all, in the absence of his exposure to PCBs originating from the city’s transformer.<sup>111</sup>

After the case was removed to federal court, the defendants moved for summary judgment. The defendants contended that there was no supporting evidence that Joiner was exposed to PCBs, furans, or dioxins, and even if he had been, the plaintiffs were unable to offer admissible scientific evidence that exposure to PCBs could cause or promote the type of cancer with which he was diagnosed.<sup>112</sup> Because of the lack of supporting evidence, defendants alleged that the plaintiffs were unable to establish that PCBs caused cancer in humans, i.e. “general causation.” Defendants further claimed that even if general causation could be assumed, the plaintiffs were unable to establish that the alleged exposure caused Joiner’s cancer, i.e., “specific causation.”<sup>113</sup> In response, the district court held that PCB exposure presented a genuine issue of material fact, but granted summary judgment with respect to furan and dioxin exposure because the plaintiffs were unable to offer sufficient evidence to establish that Joiner had been exposed to those substances.<sup>114</sup>

The remaining issue for the district court was whether to admit the plaintiffs’ expert testimony that Joiner’s cancer was caused by his exposure to PCBs. After applying a *Daubert* analysis, the district court found the expert testimony inadmissible because the testimony was buttressed on the *assumption* that Joiner was exposed to furans and dioxins.<sup>115</sup> The court then concluded that because the plaintiffs “failed to show a genuine dispute over whether furans and dioxins were in the PCBs to which Joiner was exposed,”<sup>116</sup> any expert testimony based upon

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107. Joiner v. General Elec. Co., 864 F. Supp. 1310, 1312 (N.D. Ga. 1994) (citing 15 U.S.C. § 2605(a)), *rev’d*, 78 F.3d 524 (11th Cir. 1996), *rev’d*, 522 U.S. 136 (1997).

108. *See id.* at 1312-13.

109. *See Joiner*, 522 U.S. at 139-40.

110. *See id.* at 139.

111. *See id.* at 140.

112. *See Joiner*, 864 F. Supp. at 1314.

113. *See id.* at 1315.

114. *See id.* at 1316.

115. *See id.* at 1322.

116. *Id.*

such assumptions “does not fit the facts of the case, and is therefore inadmissible.”<sup>117</sup>

Even if the assumptions of exposure could be supported by evidence, the district court still considered the opinions of the plaintiffs’ experts inadmissible due to the conclusions that the experts derived from the underlying studies.<sup>118</sup> Specifically, the defendants revealed that the plaintiffs’ experts were unable to proffer credible evidentiary support for their conclusion that PCBs cause or promote small-cell lung cancer in humans.<sup>119</sup> The district court found the studies underlying the experts’ opinions to be flawed because the studies utilized infant mice injected with massive doses of PCBs and the mice studies were preliminary in nature.<sup>120</sup>

Furthermore, the district court was not persuaded by the experts’ reliance on four epidemiological studies<sup>121</sup> because none of the studies directly supported the experts’ conclusions that PCBs promote small-cell lung cancer in humans.<sup>122</sup> The court, however, mentioned that the lack of an epidemiological study supporting the plaintiffs’ case did not require an automatic foreclosure of their cause of action because:

[A] cause-effect relationship need not be clearly established by animal or epidemiological studies before a doctor can testify that, in his opinion, such a relationship exists. As long as the basic methodology employed to reach such a conclusion is sound, such as use of tissue samples, standard tests, and patient examination, products liability law does not preclude recovery until a ‘statistically significant’ number of people have been injured or until science has had the time and resources to complete sophisticated laboratory studies of the chemical.<sup>123</sup>

Nevertheless, the court ultimately concluded that the epidemiological studies relied on by the plaintiffs’ experts were either equivocal or not helpful to the plaintiffs’ claim that exposure to PCBs caused or accelerated his cancer.<sup>124</sup> The court specifically found the experts’ opinions to be nothing more than “subjective belief or unsupported speculation.”<sup>125</sup> Thus, the court granted summary judgment as to all of the plaintiffs’ claims because *the gap between the underlying evidence and the experts’ ultimate conclusions was too wide.*<sup>126</sup>

The Eleventh Circuit Court of Appeals, applying an abuse of discretion

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117. *Id.*

118. *See id.*

119. *See id.*

120. *See id.* at 1323.

121. *See id.* at 1324.

122. *See id.* at 1326.

123. *Id.* at 1322 (citations omitted).

124. *See id.* at 1324.

125. *Id.* at 1326.

126. *See id.*

standard of review, reversed the decision in a divided three member panel.<sup>127</sup> The court noted that “a particularly stringent standard of review [was applied] to the trial judge’s exclusion of expert testimony”<sup>128</sup> in order to preserve the preference for admissibility under the Federal Rules of Evidence.<sup>129</sup> In applying this standard, Judge Rosemary Barkett, writing for the majority, disagreed with the district court’s decision to exclude the plaintiffs’ expert testimony.<sup>130</sup> She concluded that there was sufficient testimony in the record to support the conclusion that Joiner had been exposed to PCBs.<sup>131</sup> The court found the experts’ testimony reliable under FRE 702 because the experts had extensive experience, specialized expertise, conducted physical examinations of Joiner, and were familiar with “general scientific literature in the field.”<sup>132</sup> Furthermore, the court accepted the experts’ assertions that they “utilized scientifically reliable methods.”<sup>133</sup>

Judge Barkett found that the district court incorrectly reviewed the plaintiffs’ expert testimony in its entirety.<sup>134</sup> Accordingly, she wrote in support of the weight-of-the-evidence approach for determining the admissibility of expert testimony.<sup>135</sup> Relying upon *Daubert*’s departure from the wholesale exclusion of evidence, which commonly resulted under *Frye*’s “general acceptance” test, Judge Barkett explained that:

Opinions of any kind are derived from individual pieces of evidence, each of which by itself might not be conclusive, but when viewed in their entirety are the building blocks of a perfectly reasonable conclusion, one reliable enough to be submitted to a jury along with the tests and criticisms cross-examination and contrary evidence would supply.<sup>136</sup>

The court held that each reason the district court recited in response to the experts’ reliance on the animal studies did not make the underlying research unreliable in the absence of evidence that the studies themselves were flawed.<sup>137</sup>

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127. See *Joiner v. General Elec. Co.*, 78 F.3d 524 (11th Cir. 1996), *rev’d*, 522 U.S. 136 (1997).

128. *Id.* at 529.

129. *See id.*

130. *See id.* at 528.

131. *See id.* at 534.

132. *Id.* at 531.

133. *Id.* at 532.

134. *See id.* at 532.

135. *See id.*

136. *Id.* Under this approach, “[t]he expert would not be required to prove, in a step-by-step process, how she got from ‘Point A’ to ‘Point B’ as a prerequisite to admissibility of her testimony. Rather, the court would only review the expert’s conclusions ‘in their entirety.’” Quentin F. Urquhart, Jr. & Brett A. North, *Joiner v. General Electric: The Next Chapter in the Supreme Court’s Handling of Expert Testimony*, FOR THE DEF., Sept. 1997, at 9, 13.

137. *See Joiner*, 78 F.3d at 532.

Judge Barkett further posited that the appropriate “question is whether the expert’s use of these studies to help formulate an opinion is methodologically sound.”<sup>138</sup> A judge’s gatekeeping role “is not to weigh or choose between conflicting scientific opinions, or to analyze and study the science in question in order to reach its own scientific conclusions.”<sup>139</sup> Rather, a judge’s role is “to assure that an expert’s opinions are based on relevant scientific methods, processes, and data, and not on mere speculation, and that they apply to the facts at issue.”<sup>140</sup> After applying her view of the district court’s gatekeeping role, Judge Barkett concluded that the plaintiffs’ expert testimony should have been admitted because it was relevant to establish whether exposure to PCBs caused Joiner’s cancer.<sup>141</sup> Therefore, the Eleventh Circuit Court of Appeals concluded that all of the plaintiffs’ expert testimony was admissible and reversed the grant of summary judgment by the district court.<sup>142</sup>

However, Judge Edward Smith disagreed with the majority’s decision to admit the expert testimony and wrote a dissenting opinion that provides insight into the Supreme Court’s opinion in the subsequent appeal. Judge Smith explained that under *Daubert*’s reliability prong, a district court judge must evaluate “each step in the expert’s analysis all the way through the step that connects the work of the expert to the particular case.”<sup>143</sup> He further articulated that:

[A]n expert’s testimony does not “assist” the trier of fact if the expert does not explain the steps he took to reach his conclusion. We should not require the trier of fact to accept blindly the expert’s word to fill the analytical gap between proffered “scientific knowledge” and the expert’s conclusions. Therefore, the trial court “gatekeeper” has broad discretion to decide whether a leap of faith across the analytical gap is so great that, without further credible grounds, the testimony is inadmissible.<sup>144</sup>

Thus, Judge Smith wrote in support of the “admissibility approach” to expert testimony determinations when he stated “[i]t is incumbent on the proponent of scientific evidence to fill the analytical gap between a proffered study and the particular facts of the case (i.e., ‘fit’).”<sup>145</sup>

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138. *Id.*

139. *Id.* at 530. It is improper for a district court to exclude expert testimony when the court would draw a different conclusion from the proffered evidence than the conclusion rendered by the expert. *See Conning the IADC Newsletters*, 65 DEF. COUNS. J. 434, 441 (1998).

140. *Joiner*, 78 F.3d at 530; Roisman, *supra* note 5, at 567.

141. *See Joiner*, 78 F.3d at 533-34.

142. *See id.* at 534.

143. *Id.* at 537 (Smith, J., dissenting) (quoting *In re Paoli*, 35 F.3d 717, 743, 745 (3d Cir. 1994)). Judge Smith expressed his approval of the trial court’s step-by-step approach and stated that he cautions “against using the majority’s approach that applies each *Daubert* prong to the testimony as a whole.” *Id.* at 540.

144. *Id.* at 535.

145. *Id.* at 539 (quoting *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 593 n.10 (1993)).

Using this approach, Judge Smith challenged the circuit court's majority decision admitting non-supportive epidemiological studies and the majority's claims that the district court impermissibly delved into the correctness of the experts' conclusions.<sup>146</sup> He explained that the district court was not determining whether the expert opinions were correct, but whether the animal studies "fit" the facts of the case.<sup>147</sup> Therefore, he found no abuse of discretion in the district court's exclusion of the plaintiffs' expert testimony.<sup>148</sup> In fact, Judge Smith's dissenting opinion provided a detailed analysis of his concerns with the Eleventh Circuit's approach to admissibility determinations. The Supreme Court's review of this case recognized persuasiveness of the Smith dissent.

### B. Appeal to the Supreme Court

The Supreme Court granted certiorari in *General Electric Co. v. Joiner*<sup>149</sup> specifically to decide the proper standard of review with respect to a trial court's decision regarding the admissibility of expert testimony.<sup>150</sup> However, many commentators viewed it as an important opportunity to revisit *Daubert*'s methodology/conclusion distinction and the scope of a district court judge's authority with respect to expert testimony.<sup>151</sup> The arguments propounded by the petitioners (PCB manufacturers) and respondents (Joiner) provide insight as to the concerns and arguments for both the weight-of-the-evidence and admissibility approaches.

The petitioners argued in favor of the admissibility approach and for a more expanded "gatekeeping" role for district court judges. The petitioners asserted that the court of appeals incorrectly "held that if an expert cites conventional scientific authorities, the expert has satisfied the requirement of scientific methodology, no matter what the authorities actually say, and what steps are missing between the citations and the conclusion."<sup>152</sup> In other words, the declaration approach taken by the court of appeals showed great deference to the experts' own that their testimony constituted sufficient "scientific knowledge"

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According to Judge Smith, "an expert may not bombard the court with innumerable studies and then, with blue smoke and slight of hand, leap to the conclusion." *Id.* at 537.

146. See *id.* at 539.

147. See *id.*

148. See *id.* at 540.

149. *General Elec. Co. v. Joiner*, 520 U.S. 1114 (1997) (mem.).

150. See *General Elec. Co. v. Joiner*, 522 U.S. 136, 138-39 (1997).

151. See William M. Snead, *The Ongoing Revolution in Expert Witness Practice: Daubert and the Seventh Circuit*, 86 ILL. B.J. 418, 422 (1998) (indicating that "many members of the legal community believed that the case presented an excellent opportunity for the Court to revisit and perhaps scale back *Daubert*."); Urquhart & North, *supra* note 135, at 13 (anticipating the Supreme Court's opinion in *Joiner* on the "question of whether trial courts can properly examine the reasoning behind the expert's conclusions").

152. Petitioner's Brief at 48, *General Elec. Co. v. Joiner*, 78 F.3d 524 (11th Cir. 1996) (No. 96-188).

that was relevant to the facts of the case.<sup>153</sup> Petitioners agreed with the district court's decision finding the experts' testimony inadmissible because the testimony relied on inconclusive epidemiological studies and animal studies that subjected mice to high dosages of PCBs.<sup>154</sup>

In support of their argument, petitioners reasoned that “[u]nder *Daubert*, scientific methodology requires scientific reasoning, which includes as a minimum that conclusions be logically supported by premises,”<sup>155</sup> and in this case, repeated testing did not give rise to a single study supporting the conclusion that PCBs caused small-cell lung cancer.<sup>156</sup> Similarly, the American Medical Association as petitioners' amici curiae argued that the district court's gatekeeping role requires a preliminary assessment that the research underlying the expert's testimony was consistent with a reliable scientific methodology and supports the expert's ultimate conclusion.<sup>157</sup> During oral arguments before the Supreme Court, the petitioners contended that if the gatekeeping role was interpreted too narrowly, *Daubert* would essentially be overruled because a court would be required to hold proffered expert testimony admissible if the expert drew a conclusion from a published study conducted according to scientific methodology.<sup>158</sup>

The petitioners further argued that a district court judge's gatekeeping role lacks meaning unless it allows the judge to review whether “there is too great an analytical gap” between the expert's underlying premise(s) and the expert's ultimate conclusion(s).<sup>159</sup> They claimed that a district court must utilize a “link-by-link” analysis to ensure the reliability, or trustworthiness, of an expert's proffered testimony.<sup>160</sup> Hence, expert testimony would be submitted to the jury only after the district court is satisfied that the proponent has established the appropriate linkage between the expert's underlying data and the ultimate

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153. See Urquhart & North, *supra* note 135, at 13.

154. See Anthony Z. Roisman, *The Implications of G.E. v. Joiner for Admissibility of Expert Testimony*, 84 A.L.I.-A.B.A. 491, 494 (1998).

155. Petitioner's Brief at 48, *Joiner* (No. 96-188).

156. See *id.*

157. See American Medical Ass'n Brief as Amicus Curiae in Support of Petitioners at 6, *Joiner* (No. 96-188). “The district court must consider whether the conclusions to which the expert would testify can, as a matter of good science, be drawn from scientifically-generated data.” *Id.* See also Brief of Amici Curiae The New England Journal of Medicine and Marcia Angell M.D., in Support of Neither Petitioners nor Respondents, *Joiner* (No. 96-188) (espousing the use of scientists to assist judges in making decisions as to the admissibility of expert testimony); Brief Amici Curiae of Bruce N. Ames et. al, in Support of Petitioners, *Joiner* (No. 96-188).

158. See United States Supreme Court Official Transcript at \*21, *Joiner*, 522 U.S. 136 (1997), available in 1997 WL 634566 (U.S. Oral Arg.).

159. *Id.* at \*22.

160. See Urquhart & North, *supra* note 135, at 13 (proposing that “district [court] judges should be given the freedom to look behind an expert's facial assertion of ‘good science’ in ruling on the admissibility of proffered expert testimony.”).

conclusion rendered.<sup>161</sup>

In contrast to the petitioners' view, the respondents and their amici argued that the petitioners' points of contention were issues reserved for the jury because they relate to the "weight" of the proffered evidence/testimony, and not admissibility.<sup>162</sup> Therefore, "[w]here opposing experts disagree as to how epidemiological and other data should be interpreted it is for the jury to decide the issue."<sup>163</sup> The respondents reasoned that *Daubert* "made it unmistakably clear that [the district court judges'] discretion as gatekeepers does not extend to evaluating the conclusions an expert may draw based on scientifically valid principle or procedure."<sup>164</sup> Thus, the respondents' amici supported *Daubert's* methodology/conclusion distinction,<sup>165</sup> and contended that the petitioners were falsely led to believe that admissibility under *Daubert* was dependent upon the expert's conclusion or opinion.<sup>166</sup>

The respondents' view arose from the strong trust of a jury's ability to assess the weight and credibility of expert testimony,<sup>167</sup> and was bolstered by studies of jury performance.<sup>168</sup> Accordingly, the respondent's amici believed that the petitioners' concern with alleged "gaps" between an expert's proffered testimony and the expert's underlying data should go toward the weight of the testimony and not admissibility.<sup>169</sup> The respondents contended that the proper tools for ensuring the reliability of expert testimony were that of cross-examination, presentation of contrary evidence, exposing flaws in the scientific methodology or the "underlying scientific knowledge in which the expert's opinion is based."<sup>170</sup>

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161. See *id.*

162. Roisman, *supra* note 154, at 494.

163. Brief of Amicus Curiae Trial Lawyers of America in Support of Respondents at \*8, *Joiner* (No. 96-188).

164. *Id.*; see Brief of Amicus Curiae Trial Lawyers for Public Justice in Support of Respondents at \*12, *Joiner* (No. 96-188).

165. See Brief of Amicus Curiae in Support of Respondents at 9, *Joiner* (No 96-188); Trial Lawyers for Public Justice Brief at 4, *Joiner* (No. 96-188). Respondent's amici argued that the petitioners and their amici disregarded the Supreme Court's bright-line distinction that only an expert's methodology should be considered for purposes of determining admissibility. See *id.*

166. See Brief of Amicus Curiae Trial Lawyers for Public Justice in Support of Respondents at 12, *Joiner* (No. 96-188).

167. See Brief of Amicus Curiae Association of Trial Lawyers of America in Support of Respondents at 22, *Joiner* (No. 96-188).

168. See *id.* at 23 (citing Joe S. Cecil et al., *Citizen Comprehension of Different Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 744-45 (1991)).

169. See Brief for Ardit Cavallo as Amicus Curiae Suggesting Affirmance at 11, *Joiner* (No. 96-188) (arguing that the purpose of Rule 702's gatekeeping function is to control courtroom speculation and conjecture).

170. *Id.* at 11. Again, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579,

Physicians devoted to health problems affecting workers provided an interesting amicus brief on behalf of the respondents. The physicians opined that the district court disregarded the Supreme Court's directive that admissibility determinations must be consistent with the "liberal thrust of the Federal Rules of Evidence," and "should weigh broadly in favor of the proponent of the evidence."<sup>171</sup> Furthermore, the physicians' amicus brief set forth that the plaintiffs' experts utilized the scientifically valid methodology of differential diagnosis<sup>172</sup> in concluding that PCBs could cause Joiner's type of lung cancer.<sup>173</sup> The physicians' amici brief contended that the plaintiffs' physician-experts were not required, under Georgia law, to prove that PCBs were the "sole, primary or initiating cause"<sup>174</sup> of Joiner's cancer. In contrast, the experts merely needed "to discern whether any other toxic exposure might reasonably have contributed to the early appearance"<sup>175</sup> of Joiner's lung cancer by a "reasonable degree of medical certainty."<sup>176</sup> As a result, the physicians believed that the district court was incorrect in its assessment and understanding of the methodologies utilized by medical professionals.<sup>177</sup>

After both sides had the opportunity to present their written briefs and oral arguments on October 14, 1997, it appears the Supreme Court was most persuaded by the position argued by the petitioners. Transcripts from the oral argument indicate that the Court believed the district court was correct in finding that the underlying methodology proffered by the plaintiffs' experts was not sufficient to predicate a conclusion about the cause of cancer in humans.<sup>178</sup>

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596 (1993)).

171. Brief of Peter Orris, David Ozonoff, Janet S. Weiss and OCAW (Oil, Chemical, & Atomic Workers Intl. Union, AFL-CIO), as Amici Curiae in Support of Respondents at \*6, *Joiner* (No. 96-188) (citing *Daubert*, 509 U.S. at 587). This preference of admissibility is derived from the possibility for reasonable experts to arrive at "diametrically opposed conclusions." *Id.* at \*5 n.6.

172. Differential diagnosis is defined as "[t]he method by which a physician determines what disease process has caused a patient's symptoms. The physician considers all relevant potential causes of the symptoms and then eliminates alternative causes based on a physical examination, clinical tests, and a thorough case history." *Id.* at \*10 (citing REFERENCE MANUAL, *supra* note 27, at 214).

173. *See id.*

174. *Id.* at \*14 n.14 (quoting *Parrott v. Chatham County Hosp. Auth.*, 145 Ga. App. 2d 269, 270 (Ga. Ct. App. 1978); *Wells v. Ortho Pharm. Corp.*, 788 F.2d 741, 743 (11th Cir.), *cert. denied*, 479 U.S. 950 (1986)).

175. *Id.* at \*14.

176. *Id.* at \*14 n.14.

177. *See id.* at \*1.

178. *See United States Supreme Court Official Transcript at \*52, Joiner*, 522 U.S. 136 (U.S. 1997), available in 1997 WL 634566 (U.S. Oral Arg.), 66 USLW 3321. The Supreme Court posited:

Maybe the district court was saying the methodology is fine for what it purports to do. But it does not provide a sufficient predicate for use in reasoning to a conclusion about cause in humans. Maybe that's what the district court was doing. And if it was doing

Specifically, the Court was not convinced that the weight-of-the-evidence approach would ensure reliability because an expert could pass the threshold of admissibility by stating that he reviewed all available evidence prior to making his ultimate conclusion.<sup>179</sup> As a result, the Court responded that *Daubert's* methodology/conclusion distinction might be nothing more than a diversion.<sup>180</sup>

### C. The Supreme Court's Decision

The Supreme Court's opinion provided important guidance and clarification as to the extent and scope of a judge's gatekeeping role when determining the admissibility of an expert's opinion.<sup>181</sup> Upon concluding that an abuse of discretion standard governs the review of a lower court's exclusion of expert testimony,<sup>182</sup> the majority found error with the court of appeals' overly stringent review of the district court's decision excluding Joiner's expert testimony.<sup>183</sup> Therefore, the Court began with a discussion of the problems underlying causational expert testimony based on the analysis of animal and existing epidemiological studies.

The Court first addressed the animal studies and found that the plaintiffs' experts failed to explain why they based their opinions on studies utilizing mice injected with massive doses of PCBs.<sup>184</sup> Additionally, the experts did not explain why no other study demonstrated an incidence of cancer due to PCB exposure in humans.<sup>185</sup> The Court stated that "[t]he issue was whether *these* experts' opinions were sufficiently supported by the animal studies on which they purported to rely,"<sup>186</sup> not the validity of using of animal studies.<sup>187</sup> Based on the

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that, it seems to me, number one, that it was not committing any legal error. And, number two, it was making a judgment, ultimately, about what the jury could find helpful that should be subject to abuse of discretion view.

*Id.*

179. See *id.* at \*54.

180. See *id.* In response to Respondent's argument that *Daubert* merely requires the district court to decide whether the bases supporting the expert's conclusion are reliable, the Court stated that "maybe the methodology prong is just a red herring." *Id.*

181. See Neal, *supra* note 5, at 35 n.39 (stating that "the real issue that the defendants wanted the Supreme Court to consider and clarify was whether a district court could look at the conclusions that the expert had reached as well as the methodology.").

182. "Abuse of discretion—the standard ordinarily applicable to review of evidentiary findings—is the proper standard by which to review a district court's decision to admit or exclude expert scientific evidence." *Joiner*, 522 U.S. at 138-39. See Marlin, *supra* note 14, at 142-43 (providing an overview of the standard of review applied to the admissibility of scientific testimony prior to the Supreme Court's decision in *Joiner*).

183. See *Joiner*, 522 U.S. at 143.

184. See *id.* at 144.

185. See *id.* at 144-45.

186. *Id.* at 144.

187. See *id.*

facts of this case, however, the Court found no abuse of discretion by the district court's decision rejecting the animal studies as an insufficient basis of establishing causation in humans.<sup>188</sup>

Next, the Court discussed the reliability and relevance of the epidemiological studies underlying the expert's causation testimony. The majority found no legal error in the district court's decision "because it was within the District Court's discretion to conclude that the studies upon which the experts relied were not sufficient, whether individually or in combination, to support their conclusions that Joiner's exposure to PCB's contributed to his cancer."<sup>189</sup> Thus, the Supreme Court was not *expressly* rejecting the weight-of-the-evidence approach as an acceptable methodology.<sup>190</sup> To illustrate this point, the majority individually analyzed the admissibility of four epidemiological studies used by the petitioners' experts to derive their opinions and found that none of the studies "concluded" that PCB exposure increased the risk of cancer or that Joiner's cancer was aggravated by his exposure to PCBs.<sup>191</sup>

After the Court reviewed each of the four studies, the majority disagreed with the petitioners' reliance on *Daubert*'s bright-line distinction requiring judges to remain focused on the expert's methodology and not the expert's conclusions.<sup>192</sup> The majority explained that "conclusions and methodology are not entirely distinct from one another."<sup>193</sup> The Court further described the difficulty of conforming to *Daubert*'s bright-line distinction as follows:

Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply *too great an analytical gap* between the data and the opinion

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188. *See id.* at 143.

189. *Id.* at 146-47.

190. The Court recognized that there might be an argument that the experts' evidence, when taken as a whole, provided support for a conclusion that PCB exposure aggravated the development of Joiner's cancer. *See id.* at 145-47. However, the court was unwilling to take this approach because the plaintiff failed to offer evidence showing (1) how the studies were analytically linked or (2) the cumulative impact of the studies. *See id.*

191. *Id.* The first study involved Italian workers exposed to PCBs reporting an increased incidence of lung cancer, but found no causal connection between the exposure and death from cancer. *See id.* at 145. The second study reported an increased incidence of lung cancer deaths at a defendant's PCB production plant, but no causal link between the exposure to PCBs and the increased number of lung cancer deaths. *See id.* The third study involved Norwegian cable company workers exposed to mineral oil, not PCBs. *See id.* at 145-46. The fourth study was inconclusive because it involved Japanese workers who were exposed to numerous potential carcinogens (by the ingestion of toxic rice oil) in addition to PCBs. *See id.*

192. *See id.* at 146.

193. *Id.*

proffered.<sup>194</sup>

According to the Court, any expert testimony, such as the petitioners' expert testimony, which interprets existing studies or data should not be admitted based on the bare assertion of an authority figure.<sup>195</sup> Consequently, the majority found no reversible error in the district court's decision and decided that "it was in the District Court's discretion to conclude that the studies upon which the experts relied were not sufficient . . . to support their conclusions"<sup>196</sup> with respect to the cause of Joiner's cancer.<sup>197</sup>

*1. Justice Breyer's Concurrence.*—Justice Breyer's short concurring opinion placed emphasis on *Daubert*'s statement that trial judges must act as gatekeepers to ensure the reliability and relevance of all scientific testimony and evidence.<sup>198</sup> He cautioned that judges must exercise special care in making admissibility determinations because the gatekeeping requirement may often require judges

to make subtle and sophisticated determinations about scientific methodology and its relation to the conclusions an expert witness seeks to offer—particularly when a case arises in an area where the science itself is tentative or uncertain, or where testimony about general risk levels in human beings or animals is offered to prove individual causation.<sup>199</sup>

Given this difficult role, Justice Breyer noted that use of the pretrial conference under the Federal Rules of Civil Procedure provides a forum to "narrow the scientific issues in dispute."<sup>200</sup> Additionally, he encouraged district court judges to use their power to appoint independent experts under FRE 706<sup>201</sup> as a method

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194. *Id.* (emphasis added).

195. *See id.*

196. *Id.*

197. *See id.* at 146-47.

198. *See id.* at 148 (Breyer, J., concurring).

199. *Id.* at 147-48.

200. *Id.* at 149.

201. The use of court appointed experts is governed by FRE 706(a), which provides:

The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

FED. R. EVID. 706(a).

of facilitating the court's task of determining the admissibility of scientific evidence and testimony.<sup>202</sup>

2. *Justice Stevens' Partial Concurrence.*—Justice Stevens concurred with the majority's ruling regarding the proper standard of review, but dissented with the majority's holding that the testimony of the plaintiff's expert witnesses was inadmissible.<sup>203</sup> He would have remanded the matter to the court of appeals.<sup>204</sup> Stevens agreed with the Eleventh Circuit's determination that the evidence of exposure created an issue of fact.<sup>205</sup> He was unpersuaded by the majority's statement that “conclusions and methodology are not entirely distinct from one another,”<sup>206</sup> and found the court of appeals' opinion persuasive in its acceptance of the “weight of the evidence”<sup>207</sup> approach as a scientifically acceptable methodology.<sup>208</sup> Justice Stevens also found error in the district court's conclusion that no study, by itself, was sufficient to establish a link between PCBs and the plaintiff's onset of lung cancer.<sup>209</sup> He opined that the district court judge's individual examination of each of the studies led the judge to focus on the experts' conclusions, and not on the underlying methodology.<sup>210</sup>

In support of his dissent, Justice Stevens wrote that “[i]t is not intrinsically ‘unscientific’ for experienced professionals to arrive at a conclusion by weighing all available scientific evidence—this is not the sort of ‘junk science’ with which *Daubert* was concerned.”<sup>211</sup> He further stated that the district court's position of prohibiting experts from arriving at a conclusion by weighing all scientific evidence is contrary to the same methodology used by the Environmental Protection Agency (“EPA”) to assess risks.<sup>212</sup> Furthermore, he found “nothing in either *Daubert* or the Federal Rules of Evidence requires a district judge to reject an expert's conclusions and keep them from the jury when they fit the facts of the case and are based on reliable scientific methodology.”<sup>213</sup> Thus, Justice Stevens did not understand why the experts' opinions were inadmissible since the proffered opinions were not based on a single study, but on the combined weight of all available evidence—a methodology applied by the federal government.<sup>214</sup> Consequently, he found that the plaintiff's experts could reasonably infer that PCBs could promote lung cancer if the experts were allowed to combine the

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202. See *Joiner*, 522 U.S. at 149 (Breyer J., concurring).

203. See *id.* at 150-51 (Stevens, J., concurring in part and dissenting in part).

204. See *id.*

205. See *id.* at 152.

206. *Id.* at 155.

207. *Id.* at 153.

208. See *id.*

209. See *id.* at 154

210. See *id.* at 153.

211. *Id.*

212. See *id.* (citing Brief for Respondents at 40-41, *Joiner* (No. 96-188)).

213. *Id.* at 155.

214. See *id.*

results of various studies under the weight-of-the-evidence approach.<sup>215</sup>

### III. THE EFFECT OF *JOINER*

#### A. *The Methodology/Conclusion Distinction Remains*

Even though commentators disagree as to whether the Supreme Court's decision in *Joiner* resolved the circuit court split regarding the methodology/conclusion distinction,<sup>216</sup> the *Joiner* decision clearly represents a retreat from *Daubert*'s strict focus on methodology.<sup>217</sup> The Supreme Court's opinion reemphasizes that expert testimony proffered in a post-*Joiner* environment must also satisfy *Daubert*'s second prong, which requires that evidence be "sufficiently tied to the facts of the case"<sup>218</sup> by a valid scientific connection.<sup>219</sup> In short, the expert testimony must "assist the trier of fact to

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215. See *id.*

216. One commentator believes that the majority opinion in *Joiner* can be construed as allowing "district courts to exclude evidence whenever they disagree with the inductive reasoning by which the expert employing that methodology arrived at his or her conclusion about the probability of causation." Gottesman, *supra* note 1, at 772. Others agree with this proposition and state that *Joiner* marked a retreat from the Supreme Court's previously strict focus on methodology under *Daubert*, thus, expanding the scope of the district court judge's authority to include the expert's conclusions. See, e.g., Neal, *supra* note 5, at 37 (opining that after *Joiner*, a "district court [can] assess whether the conclusions that the expert purports to reach are supported by the underlying evidence."); Bruce R. Parker, *Understanding Epidemiology and Its Use in Drug and Medical Device Litigation*, 65 DEF. COUNS. J. 35, 61 (1998) (indicating in its addendum that the Supreme Court's decision in *Joiner* "re-emphasizes that a trial court is required, as part of its gatekeeping role, to evaluate not only the methodology used by an expert, but also whether the expert's conclusion[s] meet *Daubert* standards"); Preuss, *supra* note 2, at 323 (stating that *Joiner* clarifies that an expert's methodologies and conclusions are subject to review). However, at least one commentator disagrees with such an expansive reading of the *Joiner* decision. See Roisman, *supra* note 154, at 497 (stating that the *Joiner* decision does not effect *Daubert*'s admonition that a trial court's preliminary admissibility determination of expert testimony should focus on the expert's methods and not on the ultimate conclusions rendered).

217. See *Graham v. Playtex Prods., Inc.*, 993 F. Supp. 127, 132 (N.D.N.Y. 1998) (noting that with *Joiner* decision, "the Supreme Court seems to have retreated from this strict focus on methodology alone.").

218. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993).

219. See *id.* at 592. The *Daubert* court provided the following example:

The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However, (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.

*Id.* at 591.

understand or determine a fact in issue.”<sup>220</sup> The Court was simply reminding judges that there are limits to the admissibility of scientific evidence under the Federal Rules of Evidence.<sup>221</sup> A district court judge must still focus on the expert’s methodology,<sup>222</sup> and therefore, the *Joiner* decision did remove what the Supreme Court previously established in *Daubert*.

The *Joiner* decision, however, failed to clarify which methodology a scientific expert can rely upon to establish a “valid scientific connection.” Specifically, the Supreme Court did not expressly declare that an expert can rely on the weight-of-the-evidence approach as a reliable methodology.<sup>223</sup> The majority merely mentioned that it found no error in assessing the reliability of expert conclusions either “individually or in combination.”<sup>224</sup> As a result, the Court did not authorize or deny the reliability of a particular approach. The Court, nevertheless, found that the weight-of-the evidence approach lacked reliability under the *Joiner* circumstances because the Court apparently excluded the plaintiffs’ studies on an individual basis instead of examining the data as a whole. This reasoning appears to form the basis of why the Court ultimately agreed with the district court’s decision excluding the plaintiffs’ expert testimony.<sup>225</sup>

In response to the post-*Joiner* ambivalence regarding the admissibility of expert testimony, the Judicial Conference Advisory Committee proposed amendments to FRE 702.<sup>226</sup> As proposed, FRE 702 would read:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise provided that (1) the testimony is sufficiently based upon reliable facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods

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220. *Id.* A district court judge must also focus on the fitness of “[the] experts’ testimony and the data from which they draw their conclusions.” Marlin, *supra* note 14, at 149.

221. See Marlin, *supra* note 14, at 148.

222. The *Joiner* decision does not effect *Daubert*’s requirement that a judge should focus on the expert’s methods and not on the ultimate conclusions rendered. See Roisman, *supra* note 154, at 497.

223. See Gottesman, *supra* note 1, at 771-72.

224. General Elec. Co. v. Joiner, 522 U.S. 136, 147 (1997).

225. The Court provided that:

[I]t was within the District Court’s discretion to conclude that the studies upon which the experts relied were not sufficient, whether individually or in combination, to support their conclusions that Joiner’s exposure to PCBs contributed to his cancer, the District Court did not abuse its discretion in excluding their testimony.

*Id.* at 146-47.

226. See Daniel J. Capra, *Corporate Brief: Evidence Amendments*, NAT’L L.J., Oct. 5, 1998, at B-11.

reliably to the facts of the case.<sup>227</sup>

The proposed amendment language of FRE 702 was intentionally written to apply to both scientific and non-scientific expert testimony.<sup>228</sup> If ratified, the proposed FRE 702 would also clarify post-*Joiner* ambiguities surrounding *Daubert*'s famous methodology/conclusion distinction.<sup>229</sup> The language clearly indicates that the district court judge, as the gatekeeper, must review the expert's methodology and the expert's "application of that methodology to the facts of the case,"<sup>230</sup> i.e., the expert's conclusion. Furthermore, it appears that the Advisory Committee was particularly persuaded by Judge Edward R. Becker's reasoning in *In re Paoli R.R. Yard PCB Litigation*,<sup>231</sup> that "any step that renders the analysis unreliable renders the expert's testimony inadmissible . . . whether the step completely changes a reliable methodology or merely misapplies that methodology."<sup>232</sup> Thus, the combined effect of the *Joiner* decision and the recently proposed amendments to FRE 702 illustrate that a district court judge must find the appropriate balance between assessment of the expert's methodology and the expert's ultimate conclusion.

Some commentators believe that *Joiner*'s reliance on *Daubert*'s "fitness" requirement may lead to an unfortunate erosion of the jury's factfinding role<sup>233</sup> and an inappropriate extension of the district court judge's gatekeeping role.<sup>234</sup> These commentators further contend that there may be an increased incidence of judges excluding "expert evidence solely on the basis of whether they think the evidence supports the party's case."<sup>235</sup> Additionally, they believe that the *Joiner* decision may serve as a pretext for district court judges who do not believe the expert's testimony<sup>236</sup> and may extend the judge's scope of review to cover the expert's underlying assumptions and data, as well as, the expert's conclusion.<sup>237</sup>

The *Joiner* decision did not explicitly broaden a judge's scope of review, nor did it not remove *Daubert*'s methodology/conclusion distinction. The decision in *Joiner* merely clarified that a district court judge's scope of review does not end with proof of reliability. Since *Daubert* it is required that all proffered

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227. *Id.*

228. See *id.* (indicating that the all expert testimony is subject to the trial court's gatekeeping function).

229. See *id.*

230. *Id.*

231. 35 F.3d 717 (3d Cir. 1994).

232. *Id.* at 745.

233. See White, *supra* note 2, at 92

234. See *Hope After Joiner*, N.J. L.J., Mar. 23, 1998, at 26.

235. *Id.*; see also Gottesman, *supra* note 1, at 775 (stating that the *Joiner* decision "places too much discretion in the hands of district judges and makes the outcomes of toxic tort cases in federal courts turn on the prejudices of the particular judge rather than on principles of law").

236. See White, *supra* note 2, at 92.

237. See Sneed, *supra* note 151, at 422.

evidence be both reliable and relevant<sup>238</sup>—i.e., will the evidence “assist the trier of fact to understand or determine a fact in issue.”<sup>239</sup> Nevertheless, the *Joiner* court’s reemphasis on the importance of *Daubert*’s “fitness” prong may prove fatal to some products liability and toxic tort claims.

### B. *Joiner’s Effect on Products Liability & Toxic Tort Claims*

Judges have relied on the *Joiner* decision to exclude expert testimony in cases where the expert was unable to satisfy *Daubert*’s “fitness” requirement. There are several different scenarios where expert testimony is excluded in products liability and toxic tort contexts. The plaintiff’s expert testimony may be excluded if (1) the expert’s conclusion is too far removed from the available scientific knowledge or data or (2) the expert is unable to establish, beyond his own assertions, that he utilized a generally accepted scientific methodology.<sup>240</sup> In both products liability and toxic tort cases, a court may exclude expert testimony when the gap between the underlying evidence and the expert’s opinion results in an analytical “chasm.”<sup>241</sup> The expert must prove there is more than temporal proximity between the evidence and the ultimate conclusion rendered.<sup>242</sup> A court will question an expert’s conclusions that are “ad hoc” or the product of deductive reasoning or speculation if there is no physical evidence supporting the expert’s position.<sup>243</sup>

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238. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993).

239. *Id.* at 593.

240. In *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1454 (1999), the trial court excluded the plaintiff’s expert testimony with respect to causation because the expert was unable to explain his conclusion or cite scientific support for his conclusion. See *id.* at 279. The court found the expert’s assurances that he utilized a generally accepted scientific methodology insufficient, *see id.* at 276 (citing *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995) (on remand)), the experts’ testimony was allowed because the expert “relied substantially on the temporal proximity between the [plaintiff’s] exposure and symptoms.” *Id.* at 278. The trial court’s exclusion was affirmed on appeal because “the ‘analytical gap’ between [the expert’s] causation opinion and the scientific knowledge and available data advanced to support that opinion was too wide.” *Id.* at 279. See also *In re Breast Implant Litigation*, 11 F. Supp.2d 1217 (D. Colo. 1998) (excluding expert testimony necessary to establish the plaintiffs burden of causation because the available epidemiologic evidence failed to establish that breast implants caused the auto-immune diseases alleged).

241. *Belofsky v. General Elec. Co.*, 1 F. Supp.2d 504 (D.C.V.I. 1998) (excluding expert testimony that the defendant-manufacturer’s refrigerator door was defectively designed because the expert was unable to explain the discrepancy between her ultimate conclusion and contradictory evidence).

242. See *Daubert*, 509 U.S. at 589.

243. In *Childs v. General Motors Corp.*, No. CIV.A.95-0331, 1998 WL 414719 (E.D. Pa. July 22, 1998), the trial court granted the manufacturer’s motion in limine prohibiting the plaintiff’s expert from testifying that a defect in the seat design caused the front passenger seat of the manufacturer’s car to collapse because the expert was unable to show that he relied upon generally

Accordingly, for a products liability or toxic tort claim to survive the scrutiny of both *Daubert* and *Joiner*, there must be a nexus between the scientific evidence and the pertinent inquiry of the case. The requisite nexus is often difficult for the plaintiff to establish when the experts are unable to prove that their test results would remain the same if they used humans.<sup>244</sup> An expert's inability to replicate the test results using humans will not prove fatal to the admission of expert testimony, so long as the expert can explain her testing procedures and the test results were subjected to peer review in a published study.<sup>245</sup>

Nevertheless, an expert's ability to explain her scientifically reliable methodology may prove somewhat futile in the context of a novel opinion because the expert must still overcome the issue of "fitness." A toxic tort or products liability expert will fail the "fitness" requirement if the expert's opinion is unable to reference the requisite causational link to the facts of a particular case.<sup>246</sup> This may prove particularly true in situations where the expert's opinion is based primarily upon the evaluation of animal studies, the impact of cumulative studies, and statistical analysis. As a result, the exclusion of such testimony could effectively preclude legally adequate products liability or toxic

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accepted methodologies. *See id.* at \*2. The exclusion was supported by the fact that there was no physical evidence supporting the expert's proposition and the expert's theory could not be replicated. *See id.* at \*4. *See also Uribe v. Sofamor*, 1999 WL 1129703, at \*12 (D. Neb. Aug. 16, 1999) (excluding medical causation testimony that was unsupported by scientific literature or research conducted independent of the litigation as too speculative and conclusory); *Comer v. American Elec. Power*, 63 F. Supp.2d 927, 931-34 (N.D. Ind. 1999) (excluding an electrical engineer's testimony in a product liability action against an electrical utility because fire damage due to defective wiring was "not based on any particular evidence or trained observation but represents mere subjective belief and unsupported speculation"); *Hartwell v. Danek Med., Inc.*, 47 F. Supp.2d 703, 710-16 (W.D. Va. 1999) (excluding expert medical testimony as merely conclusory in its assertion that a spinal fixation device was the cause of the plaintiff's injuries, and thus precluding the plaintiff's product liability claim).

244. In *Lytle v. Ford Motor Co.*, 696 N.E.2d 465 (Ind. Ct. App. 1998), the Indiana Court of Appeals excluded expert testimony that a defect in the defendant's seat belt caused the plaintiff's wife to be thrown from the defendant's truck during a collision. The expert's testimony was unreliable, under the combined criteria of *Daubert* and *Joiner*, because the expert was unable to prove that his underlying pendulum test, "hitting the back of a suspended buckle with a small hammer with sufficient force to cause the buckle to inertially release," *id.* at 467 n.2, results would remain the same if he used testing method more similar to the forces present in a real world accident (crash test dummy). *See id.* at 472-73.

245. *See Graham v. Playtex Prods., Inc.*, 993 F. Supp. 127, 132 (N.D.N.Y. 1998) (admitting expert testimony that the defendant-manufacturer's use of rayon fibers in the defendant's tampons increased the risk of toxic shock syndrome because the court was not persuaded that the lack of epidemiological data in support of the expert's conclusions gave rise to a significant "analytical gap" requiring exclusion).

246. Barry, *supra* note 1, at 305. *See Gottesman, supra* note 1, at 769 ("Introduction of scientific evidence in toxic tort litigation to prove causal relationships is inherently problematic.").

tort cases from reaching juries, who may reasonably find in favor of the plaintiff. Such a plaintiff may therefore be unable to maintain a cause of action, survive a motion to dismiss or a motion for summary judgment.

#### IV. A LOOK INTO THE FUTURE OF EXPERT TESTIMONY

Although the true effects of the *Joiner* decision remain open to debate,<sup>247</sup> the Supreme Court's departure from *Daubert*'s bright-line distinction is likely to make the admissibility of expert testimony more restrictive,<sup>248</sup> as well as burdensome for the plaintiff. The Supreme Court's reemphasis on "fitness" may affect procedural matters relating to expert testimony and will require lawyers to spend additional time preparing their experts.<sup>249</sup> An expert's opinion that something is responsible for the cause of the plaintiff's injuries (i.e., specific causation) will be deemed irrelevant under *Daubert*'s fitness prong if an expert is unable to establish proof of general causation.<sup>250</sup> In products liability or toxic tort claims, the expert must be able to reference data that establishes the relationship between the cause and injury by a preponderance of the evidence before she can opine that the particular item was responsible for the claimant's injuries.<sup>251</sup> If an expert is unable to satisfy this burden, a district court judge may find that the testimony fails *Daubert*'s "fitness" requirement because the testimony would be confusing and unhelpful to the jury.<sup>252</sup>

Thus, "the lawyer must be sure that the expert will be able to rationally

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247. See *supra* note 215.

248. See Sneed, *supra* note 151, at 422 (stating that *Joiner* decision language undermines *Daubert*'s liberal approach to the admission of expert testimony).

249. Experts must be prepared to write detailed reports supporting their conclusions and lawyers must be prepared to spend additional time with experts to ensure the expert's ability to explain his reasoning. See Roisman, *supra* note 154, at 501.

250. In products liability claims, specific causation evidence is admissible only after the expert has established general causation between the product and the plaintiff's injuries. See *Raynor v. Merrell Dow Pharm., Inc.*, 104 F.3d 1371, 1376 (D.C. Cir. 1997) (holding that non-epidemiological studies were insufficient to establish "causation in human beings in the face of the overwhelming body of contradictory epidemiological evidence").

251. The case of *In re Breast Implant Litigation*, 11 F. Supp.2d 1217 (D. Colo. 1998), excluded plaintiffs' expert testimony in a products liability claim against silicone breast implant manufacturers because their experts were unable to establish general causation, i.e., there was no known, epidemiological study concluding that women with silicone breast implants had at least twice the risk of developing auto-immune diseases. The court admitted that epidemiological studies are not required because they may often be unavailable. See *id.* at 1228. However, the expert opinions were scientifically unreliable because none of the expert reports offered supporting data/evidence on general causation that was subject to peer review. See *id.* at 1229.

252. A district court judge should exclude scientific testimony and evidence unless he or she is convinced that it is relevant to a disputed issue of the case and will not confuse or mislead the jury. See *id.* at 1223 (citing *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1321 (1995) (on remand)).

explain why A causes B in those cases where there is not universal recognition of the conclusions advanced by the expert.”<sup>253</sup> Furthermore, the expert’s explanation must contain “the bases for her conclusions, including . . . why certain evidence supports the ultimate conclusions, in logical and understandable laymen’s language, [otherwise,] the Court’s [sic] are going to reject such evidence where on its face, or following opposing expert criticism, it seems illogical.”<sup>254</sup> Therefore, the *Joiner* decision requires an expert to explain her analysis in a manner establishing the “fitness” of the expert’s underlying data and her conclusion.<sup>255</sup>

In *Joiner*’s wake, “[t]estifying experts should be prepared to speak the language of *Daubert* in their depositions, describing the ‘methodology’ they used, how they tested or otherwise sought to ‘falsify’ their conclusions or ‘hypotheses,’ etc.”<sup>256</sup> If the district court judge is not satisfied with the expert’s explanation or finds the underlying evidence unsupportive of the facts of the case, the judge can rely on *Joiner*’s authority to exclude the expert’s testimony.<sup>257</sup> The *Joiner* decision allows judges to exclude expert testimony “solely on the basis of whether she thinks the evidence supports the party’s case.”<sup>258</sup> Thus, lawyers should be prepared to substantiate their claims with expert testimony at the summary judgment stage.<sup>259</sup>

Admittedly, the expansive gatekeeping role propounded in *Joiner* may keep otherwise valid science from the jury, however, the Supreme Court was aware of this potential risk when the Court set forth the standards governing the admissibility of expert testimony under *Daubert*.<sup>260</sup> Nevertheless, allowing judges to scrutinize each step of the expert’s analysis in support of the expert’s conclusion may lead to an increased exclusion of testimony.<sup>261</sup> The district court

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253. Roisman, *supra* note 154, at 502.

254. *Id.* at 497.

255. The *Joiner* court stressed that a district court must review the legal reliability of an expert’s underlying methodology and the expert’s conclusions. See Marlin, *supra* note 14, at 148. “*Joiner*, at its most basic level, simply states that experts must explain their analysis sufficiently to overcome any questions of fit between data and conclusion.” *Id.* at 147.

256. Sneed, *supra* note 151, at 423.

257. If the expert is unable to describe or admit that her testimony is a result of a scientific or analytical process, the testimony is likely to be excluded. *See id.*

258. *Hope After Joiner*, *supra* note 234.

259. See Sneed, *supra* note 151, at 423 (explaining that lawyers should “[b]e fully prepared by the summary judgment stage, because a significant number of decisions hold expert evidence inadmissible at this point. Affidavits or expert reports under FRCP 26(a)(2) frequently truncate the expert’s reasoning or omit the methodology.”).

260. The Supreme Court previously noted in *Daubert* that no matter how flexible a judge’s gatekeeping role, it is inevitable that the judge’s determinations of admissibility will “prevent the jury from learning of authentic insights and innovations.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).

261. Justice Stevens’ dissenting opinion in *Joiner* suggests that if a district court conducts an individual examination of the underlying studies, the court will wrongly focus on the expert’s

judge's expanded gatekeeping role increases the potential for testimonial exclusion when the scientific studies are still developing. The *Joiner* decision, therefore, further restricted the admissibility of opinions based upon the weight-of-the-evidence approach that are not exactly "junk science."

The Supreme Court has not returned to *Frye*'s general acceptance test; however, the Court has returned to a more restrictive standard governing the admissibility of expert testimony. For novel scientific evidence or testimony to be admissible under *Frye*, the expert's methods need to be generally accepted by the relevant scientific community.<sup>262</sup> According to the *Frye* standard, "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."<sup>263</sup> *Frye*'s "general acceptance" test concerned the validity and reliability of the expert's conclusions.<sup>264</sup> The expert's conclusions were valid if they were consistent with the predominant view in the expert's field<sup>265</sup> and the trial judge determined the expert's conclusions were accurate by weighing the strength of each party's arguments.<sup>266</sup>

Although *Daubert* and *Joiner* do not allow judges to determine admissibility on the comparative strength of opposing experts, the *Joiner* decision allows the Supreme Court's desire to combine the benefits of *Frye*'s more restrictive approach to scientific evidence and of *Daubert*'s reliance on procedural safeguards. Standing alone, the *Frye* standard focused on the validity of an expert's conclusions. In contrast, *Daubert*'s two-prong test requires a district court judge to focus on the expert's underlying methodology and should favor the introduction of proffered expert testimony.<sup>267</sup> The *Daubert* Court also viewed the use of cross examination, presentation of contrary evidence, and careful instructions on burden of proof as a better resolution than a wholesale exclusion of expert testimony under *Frye*'s general acceptance test.

In *Joiner*, the Supreme Court appeared to clarify the *Daubert* opinion and its previous stance on admissibility determinations. Although the *Joiner* decision did not promulgate a complete return to *Frye*'s general acceptance test, the Court did illustrate support for district court judges to evaluate the "accuracy" of the expert's conclusions by framing emphasis on the "fitness" of the proffered expert testimony. The *Joiner* opinion resembles *Frye*'s emphasis and concern over the validity and reliability of the expert's conclusions. As a result, the Court restricted opportunities for plaintiffs relying on the weight-of-the-evidence approach to pass through a district court judge's admissibility "gates." After *Joiner*, expert testimony will be submitted to the jury only after the judge is

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ultimate conclusions. See *General Elec. Co. v. Joiner*, 522 U.S. 136, 154-55 (1997) (Stevens, J., concurring in part and dissenting in part).

262. See *Daubert*, 509 U.S. at 585.

263. *Id.* at 586 (quoting *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)).

264. See *Oh*, *supra* note 13, at 564.

265. See *id.*

266. See *id.*

267. See *Daubert*, 509 U.S. at 596.

satisfied that the plaintiff has established the appropriate linkage between the expert's underlying data and the ultimate conclusion rendered. In the absence of reliable evidence to predicate the expert's ultimate conclusion, the judge may simply conclude "that there is simply too great an analytical gap between the data and the opinion proffered."<sup>268</sup>

### CONCLUSION

*Daubert's* distinction between conclusions and methods remains important. The Supreme Court's *Joiner* decision revisited the Court's previous directive and reemphasized the importance of *Daubert's* second prong of relevance or "fitness." The consequence of the *Joiner* opinion remains the subject of debate. However, various commentators and the proposed amendments to FRE 702 indicate that the Court has returned to heightened standards, thereby preventing the influx of "junk science" into the courtroom, by requiring the trial judge, as gatekeeper, to review the expert's methodology and the expert's application of that methodology to the facts of the case. This heightened level of review may create an insurmountable burden if the plaintiff's expert is unable to prove or sufficiently explain the relevance or reliability of her conclusions. As a result, the viability of many future claims will hinge on the expert's ability to survive the heightened gatekeeping scrutiny established in *Joiner*.

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268. General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997).



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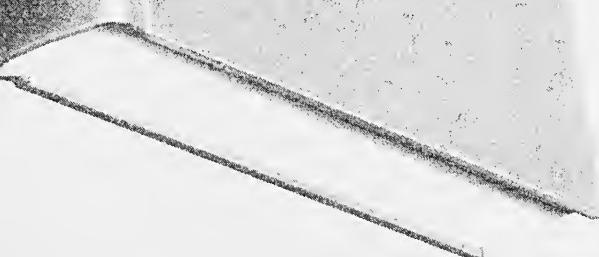
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